UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 54 | Number 1 Article 7

12-1-1975

Notes

North Carolina Law Review

NOTES

Administrative Law—Due Process Standards for Quasi-Judicial Proceedings of Municipal and County Agencies

Quasi-judicial proceedings[1] conducted by administrative agencies have traditionally varied from regular judicial proceedings in the use by agencies of less formal and more flexible procedural regulations than those used in fully adversary proceedings.[2] Procedural informality has been particularly characteristic of quasi-judicial proceedings conducted by municipal and county agencies.[3] *Humble Oil & Refining Co. v. Board of Aldermen*[4] raised the issue of whether a municipal body conducting a quasi-judicial proceeding may exercise discretion as to compliance with its own procedural rules. In a decision with important procedural implications for all local governmental agencies in the state, the North Carolina Supreme Court held that due process considerations required compliance with procedural rules in effect at the time the proceeding was conducted.[5]

In *Humble*, plaintiff acquired options to purchase or lease three adjoining lots in Chapel Hill. The lots were in a district zoned to permit construction and operation of service stations upon approval of a special use permit by the Board of Aldermen.[6] Humble's application for such a permit was jointly considered by the Aldermen and the Chapel Hill Planning Board at a duly advertised public hearing as required by the ordinance.[7] Immediately after receiving testimony in favor of

---

1. A distinction is made between administrative agency proceedings that are quasi-judicial or adjudicatory in nature and proceedings that are quasi-legislative or rule-making in nature. For an explanation of the basis on which this distinction is made see Daye, *North Carolina's New Administrative Procedure Act: An Interpretive Analysis*, 53 N.C.L. REV. 833, 838-39 (1975).

2. *See generally* Daye, *supra* note 1.

3. *See* Note, *Board of Zoning Appeals Procedure—Informality Breeds Contempt*, 16 SYRACUSE L. REV. 568 (1965).

4. 284 N.C. 458, 202 S.E.2d 129 (1974).

5. *Id.* at 467-68, 202 S.E.2d at 135. The litigation involved two additional issues. A standing challenge by the Board of Aldermen was decided in Humble's favor with recognition by the court that a "prospective vendee" under contract to purchase property may properly apply for or appeal the denial of a variance or special use permit related to such property. *Id.* at 464-65, 202 S.E.2d at 133-34. Humble's "inadequate standards" attack on the validity of the ordinance provisions governing special use permit decisions was rejected. *Id.* at 471, 202 S.E.2d at 138.

6. *Id.* at 461, 202 S.E.2d at 131.

7. Chapel Hill, N.C., Ordinance Providing For The Zoning of Chapel Hill and

and in opposition to the issuance of a special use permit, the Aldermen voted unanimously to deny Humble's application. They did not, however, refer the application to the planning board[8] as apparently required by the ordinance.[9] Upon petition by Humble, the Superior Court of Orange County issued a writ of *certiorari* and subsequently sustained the Aldermen's decision. Humble appealed, the North Carolina Court of Appeals affirmed,[10] and *certiorari* was granted by the North Carolina Supreme Court.

Humble argued that the application denial was arbitrary and a deprivation of due process from both a procedural and an evidentiary[11] standpoint. The procedural attack was based upon a contention that the ordinance required a referral to the planning board after the public hearing for an advisory recommendation before the Aldermen could

---

Surrounding Areas, § 4-B, June 10, 1974. (The Chapel Hill zoning ordinance has been extensively amended since Humble applied for a special use permit in 1971. Consequently, the ordinance sections cited herein do not coincide with the sections cited by the court in the *Humble* opinion, but the relevant provisions are identically worded in both versions.)

8. 284 N.C. at 465, 202 S.E.2d at 134.

9. The Chapel Hill zoning ordinance authorizes the issuance of special use permits by the Aldermen for specified uses and under specified conditions "after joint hearing with the Town Planning Board and after Planning Board review and recommendation." Section 4-B-1-a. The Aldermen are directed to "consider the application and said recommendation and either grant or deny the Special Use Permit requested." Section 4-B-1-g.

10. 17 N.C. App. 624, 195 S.E.2d 360 (1973).

11. 284 N.C. at 468, 202 S.E.2d at 135. The Board of Aldermen made a finding of fact that Humble's proposed service station would increase traffic hazards and endanger public safety. *Id.* at 469, 202 S.E.2d at 136. The court agreed with Humble's contention that this finding, upon which the application denial was based, was unsupported by competent evidence. The validity of flexible requirements as to the type of evidence which may be *received* in a quasi-judicial proceding was affirmed by the court's holding that N.C. GEN. STAT. §§ 143-317, -318 (1974) (repealed by Ch. 1331, § 2, [1973] N.C. Sess. Laws 703, effective July 1, 1975), which required that state agencies to which it applied must comply with rules of evidence as applied in the superior and district courts, *did not* apply to county and municipal agencies. Notwithstanding this latitude as to the *receipt* of evidence, the court relied heavily upon the stringent standards established in Jarrell v. Board of Adjustment, 258 N.C. 476, 128 S.E.2d 879 (1963), in requiring that crucial findings of fact be supported by competent, material, and substantial evidence. 284 N.C. at 468-71, 202 S.E.2d at 136-37. The *Jarrell* evidence standards were derived from N.C. GEN. STAT. §§ 143-306 to -316 (1974) (repealed by Ch. 1331, § 2, [1973] N.C. Sess. Laws 703, effective July 1, 1975), imposed in the context of a quasi-judicial determination of a "legal" or "property" right. It appears that the court in *Humble* extended the *Jarrell* standards to apply whenever the *nature of the proceedings* is quasi-judicial, regardless of the *nature of the right* involved. 284 N.C. at 470, 202 S.E.2d at 137. The evidentiary portion of the court's decision may, however, be influenced by the repeal of the statutes on which the decision rests and the enactment of the North Carolina Administrative Procedure Act, N.C. GEN. STAT. §§ 150A-1 to -64 (Supp. 1974), effective February 1, 1976. It is noteworthy that the new Act expressly excludes municipal agencies from its coverage. *Id.* § 150A-2(1) (Supp. 1974). *See* Daye, *supra* note 1, for a thorough description and interpretation of this Act.

either grant or deny the application.[12]

The Aldermen argued, and the court of appeals agreed, that the ordinance provisions meant that a referral to the planning board must be made before *issuance* but not before *denial* of a permit application. The Supreme Court rejected this construction[13] and held that compliance with the referral provision was required by both due process and equal protection considerations.[14] Referral to the planning board was viewed as a procedural safeguard designed to insure that every applicant for a special use permit received the same careful, impartial consideration.[15] The court ordered the permit denial set aside and a *de novo* consideration of Humble's application by the Board of Aldermen.[16]

The strict procedural standards applied by the court in reviewing this administrative action stand in marked contrast to the highly deferential review of local government actions demonstrated in past decades.[17] There has, however, been very little prior North Carolina litigation concerning the competence of a local government administrative agency to depart from its own procedural rules and regulations.[18]

12. 284 N.C. at 465, 202 S.E.2d at 134.

13. The court did not discuss its recent affirmation of the proposition that "[w]here an issue of statutory construction arises, the construction adopted by those who execute and administer the law . . . is entitled to 'great consideration,' . . . . It is said to be 'strongly persuasive' or even '*prima facie* correct'." MacPherson v. City of Asheville, 283 N.C. 299, 307, 196 S.E.2d 200, 206 (1973) (citations omitted).

14. 284 N.C. at 467-68, 202 S.E.2d at 135.

15. *Id.* at 467, 202 S.E.2d at 135.

16. *Id.* at 471, 202 S.E.2d at 138. This remedy should allow the agency to better serve the public interest by providing a "second chance" when the decision is substantively correct but improperly reached. It may be argued that the *de novo* approach is too burdensome for applicants. Particularly in the land use context, delays caused by the improper denial of an application may be fatal to either complex financial arrangements or to the commercial timing of business decisions. It would be anticipated, however, that agencies will make a good faith effort to comply with this decision. In addition, future applicants who are improperly denied a permit will have a better chance for favorable resolution of the conflict in the lower courts. It is also probable that the court would readily utilize the harsher remedy of ordering that a permit be issued in response to an unreasonable denial. *See In re* Application of Ellis, 277 N.C. 419, 426, 178 S.E.2d 77, 81 (1970).

17. *See, e.g.*, Rosenthal v. City of Goldsboro, 149 N.C. 128, 62 S.E. 905 (1908). The court labeled *damnum absque injuria* the damage of a plaintiff whose elm trees, believed by the city to pose a potential threat to the city sewer system, were to be removed by the city without notice or hearing. The court's language illustrates the high level of deference then accorded local government actions. "[O]ur courts will always be most reluctant to interfere with these municipal governments in the exercise of discretionary powers, conferred upon them for the public weal, and will never do so unless their action should be so clearly unreasonable as to amount to an oppressive and manifest abuse of their discretion." *Id.* at 134, 62 S.E. at 908.

18. Keiger v. Board of Adjustment, 281 N.C. 715, 190 S.E.2d 175 (1972), invalidated an ordinance amendment attempted without compliance with notice procedures

One limitation observed by courts in other jurisdictions on agency deviation from its own rules is the well-settled administrative law principle that administrative procedure must embody basic due process guarantees.[19] Due process requirements have, however, generally been interpreted less stringently in the administrative as compared to the judicial arena.[20] Even when such basic due process guarantees as notice or an opportunity to be heard are not involved, however, the prevailing view in administrative law is that, as a general rule, agencies engaged in quasi-judicial functions do not have discretion to waive, suspend, or disregard validly adopted procedural rules.[21] There are recognized exceptions to this general rule where the deviation is not arbitrary, is made in the interest of justice,[22] or results in harmless error.[23]

One important aspect of *Humble Oil & Refining Co.* is its departure from prior North Carolina case law concerning the criteria for determining the applicable procedural standards for agency determinations. Earlier cases involving the general issue of administrative agency procedural standards applied more stringent standards when a vested property right was involved.[24] The court in *Humble* gives quite limited consideration to the nature of the right involved. It is the quasi-judicial nature of the proceeding that is stressed at several points in the opinion as precipitating the imposition of specified standards.[25] To the extent that the nature of the proceeding replaces the technical nature of the right being adjudicated as a determinant of the procedural require-

specified by the ordinance and required by the enabling act. *In re Application of Ellis* also involved an amendment adopted without compliance with ordinance provisions, but this issue was not decided. The court ordered issuance of a permit that had been denied despite a stipulation that all ordinance requirements for the permit had been met. It was in the context of the exercise of "unguided discretion" by the Commissioners in deciding whether to grant or deny an application, *not* in the context of deviation from an existing procedural rule, that the court in *Ellis* required the Commissioners to "proceed under standards, rules, and regulations, uniformly applicable to all who apply for permits." 277 N.C. at 425, 178 S.E.2d at 81.

19. 2 AM. JUR. 2d *Administrative Law* § 351 (1962).

20. *E.g., id.*

21. *See* Morton v. Ruiz, 415 U.S. 199, 235 (1974); Yellin v. United States, 374 U.S. 109 (1963); Vitarelli v. Seaton, 359 U.S. 535 (1959); Coleman v. City of Gary, 220 Ind. 446, 44 N.E.2d 101 (1942); State *ex rel.* Independent School Dist. v. Johnson, 242 Minn. 539, 65 N.W.2d 668 (1954).

22. American Farm Lines v. Black Ball Freight Serv., 397 U.S. 532, 539 (1970).

23. Olin Indus., Inc. v. NLRB, 192 F.2d 799 (5th Cir. 1951), *cert. denied*, 343 U.S. 919 (1952); Union Starch & Ref. Co. v. NLRB, 186 F.2d 1008 (7th Cir.), *cert. denied*, 342 U.S. 815 (1951).

24. *Compare* Jarrell v. Board of Adjustment, 258 N.C. 476, 128 S.E.2d 879 (1963) *with* Craver v. Board of Adjustment, 267 N.C. 40, 147 S.E.2d 599 (1966).

25. *See* note 11 *supra.*

ments to be imposed, this decision has ramifications not only for special use permit proceedings, but for all quasi-judicial proceedings.[26] The probable applicability of this decision to all quasi-judicial proceedings is further supported by the constitutional base on which the court required the Aldermen to comply with the ordinance provision for a referral to the planning board.[27] If due process requirements are satisfied only by adherence to procedures outlined in the ordinance in the special use permit context, there is no apparent reason to preclude similar requirements in other quasi-judicial proceedings.

The primary analytical difficulty with the *Humble* opinion is the resulting uncertainty about the reach of the procedural compliance requirement. Must an agency comply only with those procedural rules designed to provide procedural safeguards for fundamental rights? Alternatively, is compliance with *all* procedural rules required?[28] A rigid due process requirement of compliance with all procedural rules would be a broader and more rigid requirement than has been generally imposed.[29] Such a broad requirement could lead to slavish adherence to procedural rules for the sake of uniformity per se and may well prove detrimental to the purposes that administrative bodies are uniquely designed to serve: efficiency, speed, volume, flexibility, and informality.[30] On the other hand, a due process requirement of compliance with procedural rules designed to safeguard fundamental rights is fully justified and in accord with the weight of administrative law authority from other jurisdictions.[31]

Even if the opinion is interpreted to require compliance only

26. This analytical innovation should simplify the case law in zoning cases by diminishing the importance of technical distinctions between various types of zoning decisions which have a dubious relationship to the importance of the interest involved.

The scope of proceedings viewed as falling within the quasi-judicial category will also influence the scope of the *Humble* decision. A well-reasoned opinion in Fasano v. Board of County Comm'rs, 264 Ore. 576, 507 P.2d 23 (1973), characterizes a zoning change as a judicial function rather than accepting the "legislative" label traditionally applied to this type of action. Acceptance of the rationale of the *Fasano* opinion would greatly expand the proportion of local government decisions that would be viewed as quasi-judicial and thus be subjected to the more stringent procedural requirements of *Humble*.

27. *See* text accompanying note 5 *supra*.

28. An affirmative response to this inquiry could be reached by reference to language used by the court, "[T]he Alderman must 'proceed under standards, rules, and regulations uniformly applicable to all who apply . . . .' [A] board of aldermen may not violate at will the regulations it has established for its own procedure; it must comply with the provisions of the applicable ordinance." 284 N.C. at 467, 202 S.E.2d at 135.

29. *See* text accompanying notes 19-23 *supra*.

30. *See* Daye, *supra* note 1, at 845.

31. *See* text accompanying notes 19-23 *supra*.

with procedural safeguards designed to protect fundamental rights, there is some ambiguity as to *what* specifically the court viewed in this case as a fundamental right. It seems obvious that the Aldermen could legitimately amend the ordinance in the future to delete the provision for a referral to the planning board so that referral per se would not constitute a fundamental right. Because the court viewed the purpose of the referral provision to be the assurance of careful and impartial consideration of all applications, it may be postulated that the fundamental right to be protected was the right to uniform treatment with respect to those procedural rules that protect the basic fairness of the ultimate decision. This interpretation is more plausible than the alternative that due process demands compliance with *all* procedural rules.[32]

Ambiguity about the proper scope of procedural compliance could have been avoided by a mandatory-directory analysis of the referral provision of the ordinance in lieu of the due process analysis used by the court. An accepted distinction in statutory construction is that failure to comply with a mandatory provision renders the proceeding to which the provision related illegal and void, whereas compliance with a directory provision is not necessary to the validity of the proceeding.[33] In the absence of a statutory stipulation that a given provision is mandatory, the basic criterion by which a distinction is made between mandatory and directory provisions is the achievement of the underlying legislative purpose. The function of this distinction is to avoid the exaltation of form over substance.[34] The mandatory-directory approach thus facilitates a desirable[35] case-by-case examination of the important competing interests[36] involved, with attention focused upon the specific interest of the applicant that may be ad-

32. *See* text accompanying notes 29-30 *supra* for an analysis of why this result would be undesirable.

33. *E.g.*, Gann v. Harrisburg Community Unit School Dist., 73 Ill. App. 2d 103, 218 N.E.2d 833 (1966); Younker Bros., Inc. v. Zirbel, 234 Iowa 269, 12 N.W.2d 219 (1943); Mullen v. DuBois Area School Dist., 436 Pa. 211, 259 A.2d 877 (1969).

34. Mullen v. DuBois Area School Dist., 436 Pa. 211, 216, 259 A.2d 877, 880 (1969).

35. *But see* Note, 16 SYRACUSE L. REV., *supra* note 3.

36. *See* Daye, *supra* note 1. Professor Daye enumerates the purposes that administrative bodies are uniquely designed to serve as efficiency, speed, volume, flexibility, and informality. *Id.* at 845. Competing interests are identified as "fairness considerations—equitable treatment of persons in like circumstances, notice, opportunity to participate, regularized process, articulated reasons for agency action and overall 'rationality' in agency process." *Id.* A perceptive discussion of the need for and method of arriving at a judicious balancing of these competing interests is also provided. *Id.* at 845-49.

versely affected and upon alternative means of protecting that interest. Thus, mandatory-directory analysis may result in broader compliance with procedural rules than would be demanded by due process.

Given the facts of *Humble Oil & Refining Co.*, a mandatory-directory analysis would have probably yielded the same results reached by the court through due process analysis. The advantage of the mandatory-directory analysis would have been a more precise articulation of the specific circumstances under which compliance with procedural rules is required. The disadvantage of the approach used by the court is that a cautious, overlybroad interpretation of the scope of the procedural compliance standard may well lead to the exaltation of form over substance.[37]

On balance, this decision makes a significant contribution to the development of administrative law for municipal and county agencies in North Carolina. The dramatic increase in the number of cases adjudicated by administrative agencies[38] accentuates the importance of assuring procedural fairness for parties who appear before quasi-judicial tribunals. The sensitivity demonstrated by the court toward the protection of procedural fairness, if tempered with recognition of the uniquely flexible and informal nature of administrative actions by local governmental agencies, should lead to constructive resolution of issues not definitively decided by this case.

WENDELL HARRELL OTT

Constitutional Law—Double Jeopardy in the Juvenile Courts

The right to be free from double jeopardy, as guaranteed by the fifth amendment to the United States Constitution,[1] is an integral part of the Anglo-American system of justice. "Fear and abhorrence of govern-

37. Similarly, if an agency finds the burden of a rigid and overly-broad procedural compliance standard excessively onerous, a not unlikely reaction would be to delete by amendment the provision in question whenever the provision was not a minimum requirement of due process. The imposition of rigid standards designed to enhance procedural protection of applicants could thus ironically lead to minimum rather than maximum procedural protection.

38. *See* Hanft, *Some Aspects of Evidence In Adjudications By Administrative Agencies in North Carolina*, 49 N.C.L. REV. 635, 638-39 (1971).

1. U.S. CONST. amend. V provides: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . ."

mental power to try people twice for the same conduct is one of the oldest ideas found in western civilization."[2] The United States Supreme Court recognized the fundamental nature of this right in *Benton v. Maryland*,[3] a 1969 decision which made the fifth amendment guarantee against double jeopardy applicable to state criminal prosecutions through the due process clause of the fourteenth amendment. In *Breed v. Jones*[4] the Supreme Court was presented with the question whether the prosecution of an individual in an adult criminal tribunal after an adjudicatory proceeding in juvenile court was violative of the double jeopardy prohibition.[5] A unanimous Court[6] held that the guarantee against double jeopardy is violated in such a case.[7] By so holding, the Court continued its pattern of selectively incorporating procedural rights and assured another safeguard for youths in state juvenile court systems.[8]

On February 9, 1971, the State of California filed a petition in the juvenile court for the County of Los Angeles alleging that respondent Gary S. Jones, a seventeen-year-old minor, had committed an act that, if performed by an adult, would have been in violation of the California robbery statute.[9] The petition further alleged that Jones was therefore a person described by California Welfare and Institutions Code section 602[10] and was thus within the jurisdiction of the juvenile court. At a subsequent adjudicatory or jurisdictional hearing, the juvenile court found that Jones had committed the robbery and that he was a person described by section 602.[11] At a dispositional hearing[12] held on March

2. Bartkus v. Illinois, 359 U.S. 121, 151 (1959) (Black, J., dissenting).
3. 395 U.S. 784 (1969).
4. 95 S. Ct. 1779 (1975).
5. *Id.* at 1781.
6. Chief Justice Burger wrote the opinion for the Court.
7. 95 S. Ct. at 1791.
8. Those constitutional and procedural safeguards already guaranteed by the Court are the right to notice, the right to counsel, the privilege against self-incrimination, the right to confrontation and cross-examination, and the right to a standard of proof beyond a reasonable doubt. *See* text accompanying notes 32-48 *infra*.
9. 95 S. Ct. at 1781.
10. When the petition was filed, California Welfare and Institutions Code section 602 (West 1966) provided:

> Any person under the age of 21 years who violates any law of this State or of the United States or any ordinance of any city or county of this State defining crime or who, after having been found by the juvenile court to be a person described by Section 601, fails to obey any lawful order of the juvenile court, is within the jurisdiction of the juvenile court, which may adjudge such person to be a ward of the court.

(A 1971 amendment lowered the jurisdictional age from twenty-one to eighteen. Ch. 1748, § 66, 1971 Cal. Stats. 3766.)
11. 95 S. Ct. at 1782.
12. At the time of the filing of the petition, CAL. WELF. & INST'NS CODE § 702 (West Supp. 1968) set out the procedure for the dispositional hearing.

15, the juvenile court judge found that Jones was not amenable to the rehabilitative facilities of the juvenile court[13] and that he would recommend prosecution of Jones as an adult.[14] At the next hearing the court certified Jones to be tried as an adult.[15]

Jones then petitioned for a writ of habeas corpus in juvenile court, contending that the adjudication under section 602 and the subsequent transfer to superior court placed him in double jeopardy. His petition was rejected.[16] Habeas corpus relief was likewise denied by the California Court of Appeal.[17] The California Supreme Court denied Jones' petition for a hearing.[18] Jones was then tried in superior court and was found guilty of robbery in the first degree.[19]

In December 1971, Jones, through his mother as guardian *ad litem*, filed a petition for habeas corpus in the United States District Court for the Central District of California, reasserting his claim of double jeopardy.[20] The district court refused to accept Jones' contention that jeopardy attached at his adjudicatory hearing and denied his petition.[21] The Court of Appeals for the Ninth Circuit reversed, finding that jeopardy did attach at the adjudicatory hearing and that a juvenile who is the subject of a hearing in which jeopardy has attached cannot be retried as a minor or an adult "absent some exception to the double jeopardy protection."[22]

The Supreme Court affirmed,[23] stating that for the purpose of protection against double jeopardy, the adjudicatory proceeding is essentially a criminal prosecution[24] and that jeopardy attaches when the trier of fact has begun to hear evidence.[25] The Court refused to accept a claim that, because respondent was subject to the risk of only one pun-

13. At the time, *id.* § 707 (West Supp. 1967) allowed the juvenile judge to find that the youth was not a "fit and proper subject to be dealt with" in juvenile court and to prescribe criminal prosecution.
14. Jones v. Breed, 497 F.2d 1160, 1163 (9th Cir. 1974).
15. 95 S. Ct. at 1783.
16. 497 F.2d at 1163.
17. *In re* Gary Steven J., 17 Cal. App. 3d 704, 95 Cal. Rptr. 185 (Ct. App. 1971).
18. 95 S. Ct. at 1783.
19. *Id.*
20. *Id.* at 1783-84.
21. Jones v. Breed, 343 F. Supp. 690, 692 (C.D. Cal. 1972).
22. 497 F.2d at 1168. In so holding, the Court relied heavily on Fain v. Duff, 488 F.2d 218 (5th Cir. 1973), *cert. denied*, 95 S. Ct. 2396 (1975), in which the Fifth Circuit became the first court to hold that juveniles in state court systems were constitutionally entitled to the double jeopardy protection.
23. 95 S. Ct. at 1791.
24. *Id.* at 1786.
25. *Id.* at 1787.

ishment, a trial in superior court would not violate the double jeopardy clause[26] and also rejected a "continuing jeopardy" argument.[27] The Court recognized that their decision would mean that, in most cases, a state must insure that a transfer decision be made prior to the adjudicatory hearing.[28] It concluded, however, that assuring juveniles the constitutional safeguard against double jeopardy would aid rather than hinder the system and would further the objective "that to the extent fundamental fairness permits, adjudicatory hearings be informal and nonadversary."[29]

The standard of fundamental fairness as applied to the juvenile courts has its origins in *Kent v. United States*.[30] In that case the Supreme Court held that a District of Columbia juvenile statute must be interpreted as encompassing certain constitutional rights and that the adjudicatory hearing must "measure up to the essentials of due process and fair treatment."[31] *Kent* was a portent of the landmark decision in *In re Gault*.[32] In that case the Court held that fundamental fairness[33] requires that each alleged delinquent be entitled to the following procedural guarantees at his adjudicatory hearing: (1) the right to notice of the

26. *Id.* "For, even accepting petitioner's premise that respondent 'never faced the risk of more than one punishment,' we have pointed out that 'the Double Jeopardy Clause . . . is written in terms of potential or risk of *trial* and conviction, not punishment.' " *Id., citing* Price v. Georgia, 398 U.S. 323, 329 (1970).

27. 95 S. Ct. at 1788. The concept of "continuing jeopardy" has "never been adopted by a majority of the Court." *Id., citing* United States v. Jenkins, 95 S. Ct. 1006, 1013 (1975).

28. 95 S. Ct. at 1789. The Court reasoned that such a requirement would be helpful, as it would eliminate a dilemma in which many youths find themselves. The problem arises in this context: if a transfer is allowed after the adjudicatory hearing, the youth who has cooperated has already given the prosecution his testimony and defenses before trial in the adult tribunal. On the other hand, a youth who is uncooperative may face both an unfavorable adjudication and dispositional recommendation within the juvenile court system. *Id.* at 1791.

29. *Id.* at 1791.

30. 383 U.S. 541 (1966). The Court first dealt with denial of due process to minors in Haley v. Ohio, 332 U.S. 596 (1948), though the juvenile court system was not involved. The Court reversed the murder conviction of a fifteen-year-old because of a violation of due process in obtaining his confession. The defendant's age prompted the Court to take "special care in scrutinizing the record," for the juvenile cannot be expected to react in the same fashion as would a mature adult. *Id.* at 599. Fourteen years later, the Court used its *Haley* rationale in reversing the murder conviction of a fourteen-year-old in Gallegos v. Colorado, 370 U.S. 49 (1962).

31. 383 U.S. at 562. "Fundamental fairness," a term quoted with approval by the Court in *In re* Winship, 397 U.S. 358, 363 (1970), is used interchangeably with the phrase "due process and fair treatment."

32. 387 U.S. 1 (1967).

33. Actually the phrase "due process and fair treatment" was employed. *Id.* at 30. *See* note 31 *supra.*

charges against him as well as timely written notice of the hearing,[34] (2) the right to counsel,[35] (3) the privilege against self-incrimination,[36] and (4) the right to confrontation and cross-examination.[37]

Gault was a response to an idealistic "civil" juvenile court scheme that was initiated at the turn of the century[38] to dispense "personalized" justice in a manner similar to a parent administering guidance to his child.[39] *Gault* acknowledged that the system had fallen short of its stated goal,[40] noting in particular the high crime rate among juveniles,[41] the the high incidence of recidivism,[42] and "[d]epartures from established principles of due process [which] frequently resulted not in enlightened procedure, but in arbitrariness."[43] In fact, the "civil" nature of the proceedings had previously been asserted as the rationale for denying constitutional and procedural rights guaranteed to adult criminal defendants,[44] including freedom from double jeopardy.[45]

A fifth procedural right was later guaranteed to juveniles in *In re*

---

34. 387 U.S. at 33-34.
35. *Id.* at 41.
36. *Id.* at 55.
37. *Id.* at 56-57.
38. Illinois, in 1899, was the first state to adopt a new system of courts exclusively for juveniles. ILL. LAWS 1899, §§ 1-21. At that time, the Chicago Bar Association reported that

> [T]he fundamental ideal of the Juvenile Court law is that the state must step in and exercise guardianship over a child found under such adverse social or individual conditions as to develop crime. . . . It proposes a plan whereby he may be treated not as a criminal or one legally charged with crime, but as a ward of the state . . . .

Nicholas, *History, Philosophy, and Procedures of Juvenile Courts*, 1 J. FAMILY L. 151 (1961).

39. Handler, *The Juvenile Court and the Adversary System: Problems of Function and Form*, 1965 WIS. L. REV. 7, 9-10. This approach is summed up in the latin phrase, *parens patriae*, a concept that has its roots in the medieval English chancery courts. *See* Cogan, *Juvenile Law, Before and After the Entrance of "Parens Patriae,"* 22 S.C.L. REV. 147 (1970).

40. A 1967 presidential study came to the same conclusion. *See* PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME 7-9 (1967).

41. 387 U.S. at 20 n.26.
42. *Id.* at 22.
43. *Id.* at 18-19.
44. *See, e.g., In re* Daedler, 194 Cal. 320, 228 P. 467 (1924); *In re* Magnuson, 110 Cal. App. 2d 73, 242 P.2d 362 (Dist. Ct. App. 1952); *In re* Dargo, 81 Cal. App. 2d 205, 183 P.2d 282 (Dist. Ct. App. 1947); Wissenburg v. Bradley, 209 Iowa 813, 229 N.W. 205 (1929); People v. Lewis, 260 N.Y. 171, 183 N.E. 353 (1932), *appeal dismissed*, 289 U.S. 709 (1933) (per curiam); Mill v. Brown, 31 Utah 473, 88 P. 609 (1907).
45. People v. Silverstein, 121 Cal. App. 2d 140, 262 P.2d 656 (Dist. Ct. App. 1953); Moquin v. State, 216 Md. 524, 140 A.2d 914 (1958); *In re* Santillanes, 47 N.M. 140, 138 P.2d 503 (1943); *In re* Smith, 114 N.Y.S.2d 763 (Dom. Rel. Ct. 1952); State v. Smith, 75 N.D. 29, 25 N.W.2d 270 (1946).

Winship[46] when the Court held[47] that children are constitutionally entitled to the standard of "proof beyond a reasonable doubt" in delinquency hearings.[48] However, the trend toward full constitutional rights for juveniles stopped with *McKeiver v. Pennsylvania*,[49] in which the Court stated that there is no right to trial by jury in juvenile proceedings.[50]

In assuring the sixth right to those in the juvenile court system,[51] the *Breed* Court engaged in a two-step analysis. It first considered whether the juvenile proceeding could be differentiated from a criminal prosecution for the purpose of the safeguard against double jeopardy.[52] Concluding that it could not,[53] the Court then examined whether the assurance of the right to be free from double jeopardy so diminished the juvenile court's "assumed ability to function in a unique manner"[54] that the right should not be incorporated.[55] Dealing with the problem in this fashion, the Court utilized the same analytical process employed in *Gault, Winship*, and *McKeiver*. In *Gault* and *Winship*, the Court characterized the juvenile court proceedings as criminal for the purpose of each right in question[56] and determined that the incorporation of each

46. 397 U.S. 358 (1970).

47. *Id.* at 368. The Court first had to incorporate explicitly this safeguard for adults though "it has long been assumed that proof of a criminal charge beyond a reasonable doubt is constitutionally required." *Id.* at 362, 364.

48. The Court first faced this issue in *In re* Whittington, 391 U.S. 341 (1968) (per curiam), but never reached the merits of the case and remanded to the state court for reconsideration in light of *Gault*. In DeBacker v. Brainard, 396 U.S. 28 (1969) (per curiam), the Court similarly declined to rule on the question, finding that resolution of the issue would not be appropriate in the circumstances of the case.

49. 403 U.S. 528 (1971).

50. *See* note 58 and accompanying text *infra*. The right to jury trial question had been previously raised in *In re* Whittington, 391 U.S. 341 (1968) (per curiam), and DeBacker v. Brainard, 396 U.S. 28 (1969) (per curiam), but the Court refused to rule on the issue in *Whittington*, for it never reached the merits of the case. *See* note 48 *supra*. *DeBacker* was held to be an inappropriate case for a resolution of the jury trial issue because the adjudicatory hearing had taken place prior to the effective date of Duncan v. Louisiana, 391 U.S. 145 (1968), which held the right of jury trial applicable to the states.

51. It might be argued that the Court did not fully incorporate the right. *See* text accompanying notes 59-65 *infra*.

52. 95 S. Ct. at 1785-87.

53. *Id.* at 1786. In so finding, the Court reiterated the conclusion reached in *Gault* that the juvenile is subject to substantially the same loss of liberty as an adult and also faces similar societal stigma. Since the juvenile encounters the same "potential consequences" as does the adult accused, he suffers the same "heavy pressures and burdens . . . ." *Id.*

54. *Id.* at 1787, *citing* McKeiver v. Pennsylvania, 403 U.S. at 547.

55. 95 S. Ct. at 1787-91.

56. *In re* Winship, 397 U.S. at 365-67 (right to standard of proof beyond a reasonable doubt); *In re* Gault, 387 U.S. at 35-36 (right to counsel); *id.* at 49-50 (privilege against self-incrimination); *id.* at 56 (right to confrontation and cross-examination). *Gault* did not discuss similarities in the juvenile and criminal court

right would not interfere with the functioning of the system in the desired manner.[57] The right to trial by jury was denied in *McKeiver* when the Court found that the possible advantages were outweighed by the fact that such a guarantee might "remake the juvenile proceeding into a fully adversary process and [would] put an effective end to what [had] been the idealistic prospect of an intimate, informal protective proceeding."[58]

The Court's mode of analysis in *Breed* was therefore consistent with previous cases. However, one way in which *Breed* might differ from those prior cases is the way the Court appeared to anticipate situations in which fundamental fairness would not require the protection against double jeopardy that they enunciated. The holding in *Breed* is limited to those situations in which a juvenile is prosecuted in trial court after an adjudicatory hearing in juvenile court.[59] The holding, coupled with the following language from the case, gives the impression that there may be some situations in which the right to be free from double jeopardy may give way to the desired operation of the juvenile court system:

> If there is to be an exception to that protection in the context of the juvenile court system, it must be justified by interests of society, reflected in that unique institution, or of juveniles themselves, of sufficient substance to render tolerable the costs and burdens . . . which the exception will entail in individual cases.[60]

There are three basic situations in juvenile proceedings that might involve the issue of double jeopardy.[61] *Breed* is an example of one situation: the prosecution of a minor in a criminal trial for the same acts that already were examined in an adjudicatory juvenile hearing. Another possibility is waiver of jurisdiction by the juvenile court after the start of

---

processes in analyzing the right to notice, as the standard for a constitutionally adequate notice is the same in a civil or criminal proceeding. *Id.* at 33.

57. *In re* Winship, 397 U.S. at 366-67 (right to standard of proof beyond a reasonable doubt); *In re* Gault, 387 U.S. at 32-33 (right to notice); *id.* at 35, 38 n.65 (right to counsel); *id.* at 51-52 (privilege against self-incrimination); *id.* at 56-57 (right to confrontation and cross-examination).

58. 403 U.S. at 545. The Court gave a total of thirteen reasons for its decision. *Id.* at 545-51. The rationale of *McKeiver* has been heavily criticized. *See, e.g.*, Note, *McKeiver v. Pennsylvania: A Retreat in Juvenile Justice*, 38 BROOKLYN L. REV. 650 (1972); Note, *When Is a Criminal Trial Not a Criminal Trial?—The Case Against Jury Trials in Juvenile Court*, 46 ST. JOHN'S L. REV. 126 (1971).

59. 95 S. Ct. at 1791.

60. *Id.* at 1788.

61. *See* Rudstein, *Double Jeopardy in Juvenile Proceedings*, 14 WM. & MARY L. REV. 266, 278-311 (1972).

an adjudicatory hearing and a subsequent transfer to criminal court.[62] Finally, a minor's acts might be the subject of a second adjudicatory hearing in juvenile court, if the first hearing was terminated in some manner favorable to the accused.[63]

In light of *Breed's* position as to the moment jeopardy attaches, the first two situations are now functionally the same for the purpose of double jeopardy determinations. Because jeopardy is said to attach when the juvenile court begins to hear evidence,[64] it does not appear to matter whether the adjudicatory hearing reaches a conclusion before the case is transferred; if evidence is heard, that would seem to be enough to prevent a second episode in criminal court.

As to a second adjudicatory hearing after a favorable termination, logic as well as fundamental fairness dictates that this second juvenile hearing not be permitted. If the original adjudicatory hearing puts a youth in jeopardy, so should the second. No court faced with this factual situation since the *Gault* decision has allowed a second hearing.[65] Thus, despite the possibility of an "exception," there does not seem to be a context in which one could arise.

Breed is therefore analytically consistent with the approach taken by the Supreme Court in selectively incorporating rights for youths in the juvenile court system. Rather than merely granting juveniles all of the rights already guaranteed to adults accused of crime, the Court has considered each safeguard separately and has determined (through the two-step analysis) whether the states will be required to furnish that safeguard. Although this technique has been cited as particularly suited for the setting of juvenile justice,[66] each time the Court guarantees another right, the inconsistency of the entire approach is further emphasized. Justice Black, concurring in *Gault*, saw the illogic of first stating that a youth in juvenile court faces the same risk as does an adult, and then denying the juvenile the same constitutional and procedural guarantees that the adult enjoys: "[I]t would be a plain denial of equal protection of the laws—an invidious discrimination—to hold that others subject to heavier punishments could, because they are children, be

62. Nearly all jurisdictions permit this procedure. *Id.* at 297.

63. *See, e.g.*, Richard M. v. Superior Court, 4 Cal. 3d 370, 482 P.2d 664, 93 Cal. Rptr. 752 (1971).

64. 95 S. Ct. at 1787.

65. Rudstein, *supra* note 61, at 279.

66. *See* Dorsen and Rezneck, *In re Gault and the Future of Juvenile Law*, FAMILY L.Q., vol. 1, no. 4, 11-12 (Dec. 1967).

denied these same constitutional safeguards."[67] As each right is considered by the Court and the juvenile process is said to be indistinguishable from a criminal trial for the purpose of that right, the methodology of selective incorporation in the context of the juvenile court system becomes increasingly difficult to justify.

CHARLES B. WAYNE

Constitutional Law—The Decline of Male Chauvinism?

The Supreme Court once stated that woman is destined for an inferior role in the societal scheme of things, that she is properly placed in a class by herself, and that the law of the Creator deems that she perform the duties of wife and mother and no other.[1] In the years since, the Supreme Court has softened its "romantic paternalism" toward the "weaker" sex and now views woman essentially as man's equal.[2] This evolution has not been without its difficulties, however, and even the current Supreme Court stance on sex discrimination is obscure. The principal difficulties seem to be the determination of the standard[3] with which to judge the discrimination in such cases and a determination of how stringently that standard will be applied.

Stanton v. Stanton[4] is the most recent Supreme Court exposition on sex discrimination and the equal protection clause of the fourteenth amendment.[5] In an almost unanimous decision[6] the Court held that a Utah statute which fixed the age of majority at eighteen for girls and

67. 387 U.S. at 61 (Black, J., concurring). The same arguments were made by the dissenters in McKeiver v. Pennsylvania, 403 U.S. at 557-63.

1. Muller v. Oregon, 208 U.S. 412 (1908); Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1872).

2. This evolutionary change is examined in Gunther, *The Supreme Court 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972). *See also* Note, *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065 (1969); Note, *Constitutional Law: The Equal Protection Clause and Women's Rights*, 19 LOY. L. REV. 542 (1973); Note, *The Decline and Fall of the New Equal Protection: A Polemical Approach*, 58 VA. L. REV. 1489 (1972).

3. *See* text accompanying notes 14-25 *infra*.

4. 95 S. Ct. 1373 (1975).

5. U.S. CONST. amend. XIV, § 1. This section is the principal vehicle used by litigants to challenge statutes that allegedly discriminate against females on the basis of sex.

6. Only Justice Rehnquist dissented.

at twenty-one for boys could not, under any standard, survive an attack based on equal protection. On the surface, the treatment of the sex discrimination issue in *Stanton* is characteristic of recent Supreme Court holdings involving equal protection; yet, when analyzed, *Stanton* seems to be another step forward in toughening the approach of the Court toward statutory classifications which afford different treatment of the sexes.

Thelma Stanton, the plaintiff, and her husband James, the defendant, obtained a divorce in Utah in 1960. At that time the court awarded custody of the two Stanton children[7] to plaintiff and, in a separate agreement, provided that defendant was to pay a certain sum per month for each child as "child support." Defendant discontinued these payments when his daughter turned eighteen in 1971. Plaintiff then moved in the divorce court for judgment in her favor ordering support of the child after she attained the age of eighteen. The court, under the provisions of the Utah majority statute,[8] concluded that defendant was not obligated to support his daughter beyond the age of eighteen although he *was* obligated to support his son until age twenty-one.

On appeal to the Utah Supreme Court,[9] plaintiff argued that the statute was invidiously discriminatory and denied equal protection of the laws. The Utah court held that the statute was not unconstitutional, that the different treatment of men and women was founded on a reasonable basis, and that some of our ancestors' "old notions" on the fundamental differences between the sexes were viable today and should continue to prevail.[10] These "old notions" formed the rationale of the state court's decision and included the beliefs that it is man's primary responsibility to provide a home, that it is a salutary thing for him to get a good education before he undertakes those responsibilities, that girls tend to mature physically, emotionally and mentally at an earlier age than boys, and that girls generally tend to marry earlier. Thus, the court concluded that there was "no basis" upon which the majority

7. The two children were Rick who was five and Sherri who was seven. 95 S. Ct. at 1375.

8. UTAH CODE ANN. § 15-2-1 (1953). The statute reads: "*Period of minority.*— The period of minority extends in males to the age of twenty-one years and in females to that of eighteen years; but all minors obtain their majority by marriage." The Court determined that section 15-2-1, which has little legislative history, was applicable due to the Utah court's determination that support money is for the benefit of "minor" children. 95 S. Ct. at 1375-76.

9. 30 Utah 2d 315, 517 P.2d 1010 (1974).

10. *Id.* at 318-19, 517 P.2d at 1012.

statute could not be justified and that plaintiff was not entitled to support money for her eighteen-year-old daughter.

The Supreme Court reversed, holding that under the *Reed*[11] test the Utah majority statute violated the equal protection clause of the United States Constitution. Justice Blackmun explained that the "old notions" cited by the Utah court did not justify the different treatment imposed by the statute. He related:

> A child, male or female, is still a child. No longer is the female destined solely for the home . . . and only the male for the marketplace and the world of ideas. Women's activities and responsibilities are increasing and expanding. . . . If a specified age of minority is required for the boy in order to assure him parental support while he attains his education and training, so, too, it is for the girl. . . . [I]f the female is not supported so long as the male, she hardly can be expected to attend school as long as he does, and bringing her education to an end earlier coincides with the role-typing society has long imposed.[12]

The Supreme Court, therefore, concluded that the age-sex differential embodied in the Utah majority statute was unconstitutional.[13]

Long before *Stanton*, the Supreme Court's approach to a classification providing for different treatment of the sexes was to examine the statute and determine if there was a "rational basis" for the legislative categorization.[14] If there was such a basis, the statute was valid. This approach was the traditional or passive review standard which was designed and intended to preserve state legislative autonomy with as little interference from the judiciary as possible.[15]

Another test developed to cover other situations in which the

---

11. *See* text accompanying notes 29-31 *infra*.

12. 95 S. Ct. at 1378.

13. The case was remanded to determine whether once the age-sex differential was eliminated, the appellant was entitled to the support money for Sherri between the ages of eighteen and twenty-one. The appellant argued that the common law should apply and that the age of minority should end at twenty-one for both boys and girls. She cited UTAH CODE ANN. §§ 78-45-1 to -13 (1953) which provide that every man and woman shall support his child and that "child" means son or daughter under the age of twenty-one. The appellee urged that the inequality is to be remedied by treating males as adults at eighteen. This age would correspond with the right to vote and other privileges of adulthood. In any event, the appellant may have won her lawsuit but it remains distinctly possible that she will not be entitled to the support money. *See* 95 S. Ct. at 1379.

14. *See, e.g.*, Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 81 (1872) (where the fourteenth amendment was initially limited to racial discrimination). The clause was soon expanded to include any denial of equal protection. *See also* Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1872).

15. *See generally* Note, 58 VA. L. REV., *supra* note 2.

Supreme Court deemed that more than legislative reasonableness was required to uphold different statutory treatment. Thus, the "strict scrutiny" test was designed to place the statute into active review and force upon states the burden of showing a "compelling interest" for certain classifications that invidiously discriminated. In order for strict scrutiny to be applied, the discrimination must involve a "fundamental right," or the classification upon which the discrimination rests must be "suspect". Accordingly, the Supreme Court has denoted that religion,[16] associational freedom,[17] work,[18] voting,[19] procreation,[20] and travel[21] are all fundamental rights while race,[22] lineage,[23] and alienage[24] are inherently suspect categories.[25]

A classification based on sex, however, has never been declared by a majority of the Supreme Court to be inherently suspect.[26] This refusal has resulted in application of the passive review standard—a standard that has not once overturned a sex classification.[27] In fact, the only bright spot for women's rights in the years between the adoption of the fourteenth amendment and 1971 was the passage of the nineteenth amendment giving women the right to vote.[28]

Despite this bleak history, in 1971 *Reed v. Reed*[29] became the first Supreme Court case to declare a statute providing for different treatment of the sexes invalid under the equal protection clause. The case

16. Sherbert v. Verner, 374 U.S. 398, 406 (1963).
17. Bates v. Little Rock, 361 U.S. 516, 524 (1960).
18. Truax v. Raich, 239 U.S. 33, 41 (1915).
19. Reynolds v. Sims, 377 U.S. 533, 561-62 (1964).
20. Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).
21. Shapiro v. Thompson, 394 U.S. 618, 634 (1969).
22. Loving v. Virginia, 388 U.S. 1, 9 (1967); McLaughlin v. Florida, 379 U.S. 184, 191-92 (1964).
23. Korematsu v. United States, 323 U.S. 214, 216 (1944).
24. Takahashi v. Fish and Game Comm'n, 334 U.S. 410, 420 (1948); Truax v. Raich, 239 U.S. 33, 43 (1915).
25. The Court has also implied that in certain circumstances poverty and possibly even wealth are suspect categories. *See* Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); Douglas v. California, 372 U.S. 353, 356-57 (1963); Griffin v. Illinois, 351 U.S. 12, 17 (1956). *But cf.* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973).
26. The closest the Court has come to declaring sex as a suspect classification was Frontiero v. Richardson, 411 U.S. 677 (1973), where a plurality held that such a categorization was inherently suspect. *See* text accompanying note 33 *infra*.
27. In *Stanton* the Court held that the statute was invalid under *any* test but a *Reed* standard was applied. 95 S. Ct. at 1377, 1379.
28. For examples of the Supreme Court's treatment of the sex classification during these years see Hoyt v. Florida, 368 U.S. 57 (1961); Goesaert v. Cleary, 335 U.S. 464 (1948); Muller v. Oregon, 208 U.S. 412 (1908); Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1872).
29. 404 U.S. 71 (1971).

involved a challenge to a provision of the Idaho probate code which gave preference to males over females when persons otherwise of the same entitlement applied for appointment as administrator of a decedent's estate. The Court proposed that this different treatment, based upon the sex of the applicant, "establishes a classification subject to *scrutiny*."[30] Although the Court did not say what type of scrutiny it would employ, the standard of review noticeably differed from the traditional, passive review standard. Contrary to the test actually applied, the *Reed* Court quoted language from prior cases which seemed to dictate the use of a rational basis test in sex discrimination cases; nonetheless, the Court seemingly applied a standard that was more means-focused in that the purposes, rather than the basis, of the statute were the subjects of the Court's review.[31] The consequence was that the Court had somewhat hesitantly and muddily broken from the passive review standard.

Frontiero v. Richardson[32] followed the *Reed* breakthrough, with a plurality of the Court holding that a sex classification was inherently suspect.[33] The Court in its opinion noted that *Reed* gave "implicit support" for a determination of suspectness and that strict scrutiny in combination with a *Reed* analysis of the statutory means or objectives resulted in the statute's invalidity. *Frontiero* then was another positive step by the Court toward, at the most, a declaration of sex suspectness or, at the very least, a standard of review that involved more than minimal scrutiny.

---

30. *Id.* at 75 (emphasis added).

31. The *Reed* Court determined that "[a] classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation . . . .'" *Id.* at 76, *quoting* Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920) (where the Court said it was applying the passive standard of review). For a discussion of the means-focused approach see Gunther, *supra* note 2. For a discussion of the various types of tests see Note, *Constitutional Law —Mandatory Maternity Leave Termination and Return Provision of School Boards Violate the Due Process Clause of the Fourteenth Amendment*, 23 DRAKE L. REV. 690 (1974).

32. 411 U.S. 677 (1973) (where a statute was invalidated that made it easier for a serviceman to claim his wife as a dependent than for a servicewoman to claim her husband similarly).

33. Justices Brennan, Douglas, Marshall, and White joined in declaring that sex was suspect. Justice Stewart concurred but would not declare suspectness stating only that a sex classification was invidiously discriminatory. This statement left open the possibility that he may yet be persuaded to hold suspectness. Justices Blackmun, Powell and Chief Justice Burger seemed to believe that the Equal Rights Amendment would provide a solution and deferred for the time being any decision of suspectness. *Id.* at 678, 691-92. The *Frontiero* decision reversed a court of appeals finding that had rested on the application of a *Reed* standard. *See* Frontiero v. Laird, 341 F. Supp. 201 (M.D. Ala. 1972).

Although *Reed* and *Frontiero* seemed to indicate that the Supreme Court would no longer tolerate sex discrimination and that the next step in the evolution would be a majority declaration of suspectness, the cases between *Frontiero* and *Stanton* present a confusing array of differing applications of the passive and active review standards.[34] The result of this conflict was confusion in the federal courts (as well as in the Supreme Court itself) over which standard was applicable. Accordingly, several lower federal courts held during this period that a sex classification is inherently suspect;[35] others continued to apply a standard of passive review[36] while still others concluded that the proper test is somewhere between passive and active review.[37] The *Reed-Frontiero* legacy, in any event, appears to be the impetus for future Supreme Court decisions despite the haziness of the Supreme Court's approach in other cases of the seventies.[38] *Stanton*, indeed, seems to capsulize this legacy.

The trend toward close scrutiny of a sex classification is evident in *Stanton*. Although the Court purports to apply a *Reed* standard, the test actually used is tighter than the standard in *Reed* and, in evolutionary terms, is nearer to a close scrutiny-suspect category type of review.[39] There are several reasons for this conclusion.

---

34. *Compare* Kahn v. Shevin, 416 U.S. 351 (1974) (where a discriminatory tax scheme was upheld) *and* Geduldig v. Aiello, 417 U.S. 484 (1974) (where the dissenting justice points out that the majority is retreating from the strict review required by *Reed* and *Frontiero*) *with* Weinberger v. Wiesenfeld, 95 S. Ct. 1225 (1975) (where the Court applied a *Frontiero* standard and upheld a lower federal court's decision that used a strict scrutiny approach).

35. Johnson v. Hodges, 372 F. Supp. 1015 (E.D. Ky. 1974); Wiesenfeld v. Secretary of HEW, 367 F. Supp. 981 (D.N.J. 1973), *aff'd sub nom.* Weinberger v. Wiesenfeld, 95 S. Ct. 1225 (1975); Stern v. Massachusetts Indem. and Life Ins. Co., 365 F. Supp. 433 (E.D. Pa. 1973); O'Neill v. Dent, 364 F. Supp. 565 (E.D.N.Y. 1973).

36. Brenden v. Independent School Dist., 477 F.2d 1292 (8th Cir. 1973); Pendrell v. Chatham College, 370 F. Supp. 494 (W.D. Pa. 1974); Smith v. East Cleveland, 363 F. Supp. 1131 (N.D. Ohio 1973); Healy v. Edwards, 363 F. Supp. 1110 (E.D. La. 1973); Bowen v. Hackett, 361 F. Supp. 854 (D.R.I. 1973).

37. Eslinger v. Thomas, 476 F.2d 225 (4th Cir. 1973); Wark v. Robbins, 458 F.2d 1295 (1st Cir. 1972).

38. As an example of this new impetus, *compare* Hoyt v. Florida, 368 U.S. 57 (1961) *with* Taylor v. Louisiana, 95 S. Ct. 692 (1975). *See also* Justice Marshall's dissent in Dandridge v. Williams, 397 U.S. 471, 521 (1970) (where he foresees a stricter application of the passive review standard—a "balancing test" approach); Note, 58 VA. L. REV., *supra* note 2.

39. Note that the *Stanton* case and a sex classification, in general, meet the definition of "suspectness" conveyed in San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 28 (1973): "[t]he class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."

First, according to *Reed,* an application of an intermediate, means-focused approach involves an analysis of the majority statute's purpose, which must have a fair and substantial relation to the different treatment the statute provides for eighteen-year-old girls and for eighteen-year-old boys.[40] However, instead of focusing upon the purpose of the Utah majority statute—that purpose being the grant of adult status to eighteen-year-old girls while at the same time postponing the majority age grant to boys until they reach the age of twenty-one—the Court looks solely to the legislative reasoning behind the majority statute's purpose.[41] This approach is characteristic of active review, which compels the state to proffer an extraordinary reason or interest to justify its different treatment of the sexes. Indeed, in the *Stanton* case, if the Court had strictly adhered to the *Reed* balancing test,[42] they would have found a fair and substantial relationship; in fact, the "old notions" summarily dismissed by the Court do have credence even today.[43]

The Supreme Court, moreover, placed great importance on the fact that the majority statute itself provided that marriage terminated minority.[44] Notwithstanding the fact that if minors of any age or of either sex get married there is a greater need for them to succeed to the rights of adults and that that need should supersede the corresponding rights of other minors, the Court neglected to examine this purpose of the provision. It instead focused upon the state's interest in having such a statement in a majority statute and impliedly found that the state's reason for including it, together with the "old notions," were not compelling.

---

40. In *Reed* the object of the probate statute was the administrative convenience in simplifying the determination of executors of estates. 404 U.S. at 76.

41. The state interests referred to are the "old notions" proffered originally by the Utah Supreme Court. 30 Utah 2d at 319, 517 P.2d at 1012. Such "old notions" under a rational basis test have in the past been upheld by the courts. *See* Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1872); Stanton v. Stanton, 30 Utah 2d 315, 517 P.2d 1010 (1974). Also, since the purpose of the statute is not compared with the legislative object, the *Reed* test has not been adhered to. Moreover, the "old notions" do have substantial relation to the purpose of the statute. *See* 1974 UTAH L. REV. 144, 165-66. Thus, the Court apparently treats these "old notions" as "interests" of the state in enacting the statute. The review is correspondingly tighter and more demanding than the previous sex discrimination standards.

42. The different treatment of the sexes is balanced against the purpose of having girls become adults before boys. 95 S. Ct. at 1377-78.

43. For instance, statistics show that girls, on the average, do mature physically, emotionally, and mentally at a faster pace than boys and that at ages eighteen to nineteen girls are much more likely to be married than boys. *See, e.g.,* E. HURLOCK, CHILD DEVELOPMENT 104-05 (5th ed. 1972); U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF U.S. 1973 at 38; TANNER, *Genetics of Human Growth,* in 3 HUMAN GROWTH 54-55 (J. Tanner ed. 1960).

44. UTAH CODE ANN. § 15-2-1 (1953).

Another important court decision has dealt with a situation similar to *Stanton* in which "old notions" were offered as a state interest and in which a *Reed* standard perplexingly would not produce the desired result of invalidating the statute.[45] In *Sail'er Inn, Inc. v. Kirby*[46] the court found that the reasoning behind the sex differential—the "old notions"—would not survive a close scrutiny although a *Reed* test or passive review would result in upholding the statute. That court determined that the sex classification presented for review was inherently suspect and felt compelled to disregard the notions of what is "proper" for a person of either sex.[47] *Reed* was thus rejected as a standard in a manner akin to the *Stanton* Court's renunciation of the Utah sex differential.

The seemingly tighter approach indicates that the Court is seeking in *Stanton* to clarify the confusing *Reed* test.[48] In doing so, the Supreme Court has developed a review that is stricter than *Reed* in that it focuses upon the intent of the legislature to the neglect of the purpose of the statute. It is thus a more demanding approach—placing the burden upon the state to explain that it has substantial reasons for promulgating such a statute.

A second reason for the conclusion that *Stanton* epitomizes the Supreme Court's trend toward close scrutiny of sex categories is the manner in which the Court reached the sex discrimination issue. *Stanton* appears to be the first sex discrimination case in which the constitutionality of a statute is considered "in the context" of another statute.[49] This "context" approach varies from the usual equal protection attack where the statute itself is the focus of the alleged discrimination. For example, *Reed, Frontiero,* and other key cases are all concerned with a statute which itself has victimized the party, and it is always the victimized party who claims discrimination. In this regard,

45. 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971) (where court declared invalid a statute regulating the use of females as bartenders). *But cf.* Goesaert v. Cleary, 335 U.S. 464 (1948).

46. 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971).

47. *Id.* at 5, 9, 485 P.2d at 533, 537, 95 Cal. Rptr. at 333, 337.

48. In *Reed* the language of the test is a paraphrase of the passive review standard applied in *Royster Guano*; the case also cites as authority McGowan v. Maryland, 366 U.S. 420 (1961) (where the Court applied a "close scrutiny" review because of the fundamental right involved—the first amendment—and related, *id.* at 425, that the test applied is that the unequal treatment have a "[s]ubstantial and rational relation to the object of the legislation"). Therefore, when *Reed* is seen in the light of the *Royster Guano* and *McGowan* opinions, one must wonder what *Reed* really stands for.

49. The Court states that "§ 15-2-1 *in the context of child support* does not survive an equal protection attack." 95 S. Ct. at 1379 (emphasis added).

Stanton portrays a situation where the victimized party, the Stanton's daughter, is not a litigant nor is she entiled to the support money.[50] For that reason, the Court determined that the majority statute must be visualized in light of other statutes for it to be found discriminatory to the appellant. In other words, the majority statute *alone* is not unconstitutional but in the context of the statutory provisions for child support it is. Thus, the Court has taken its sex classification analysis one step further, not only by allowing one who has not been victimized directly by the statute to challenge its validity, but also, for the first time, by invalidating a statute that would not necessarily be of itself unconstitutional but, when applied in conjunction with other statutes, denies equal protection of the laws.

Furthermore, the Court reached this conclusion on shaky statutory grounds. The majority statute comes into play solely on the basis of a 1946 case which describes support money "as compensation to a spouse for the support of *minor* children."[51] However, in 1957, Utah enacted the Uniform Civil Liability for Support Act which specifically provides that the parent shall support his children and that a "child" is a son or daughter under twenty-one years of age.[52] The Court did not fully discuss whether the 1957 Act is perhaps controlling and thus makes the majority statutory issue moot.[53] On the contrary, it is plainly evident that the Court wished to decide the sex discrimination issue despite the initial difficulties of standing and in the statute itself and despite available statutory alternatives for disposing of the case. This procedure is indicative of the Supreme Court's willingness to carefully scrutinize statutes that result in different treatment based on sex.[54]

---

50. For a Utah case holding that the right to support money belongs to the parent and not the child, see Larsen v. Larsen, 5 Utah 2d 224, 228, 300 P.2d 596, 598 (1956).

51. Anderson v. Anderson, 110 Utah 300, 306, 172 P.2d 132, 135 (1946).

52. UTAH CODE ANN. §§ 78-45-1 to -13 (1957).

53. Justice Rehnquist in his dissent felt that the Court should not be passing on this issue. He proposed that the proper jurisdiction was in the Utah Supreme Court where the intention of the parties first needed examination and if the term (the age when support would cease) could not be supplied from the intent, the question was one of interpretation of Utah statutory law. Only if section 15-2-1 were deemed the controlling statute, rather than the child support sections, and Utah upheld its constitutionality could the Supreme Court hear the case. 95 S. Ct. at 1380-81.

54. *See* Johnston, *Sex Discrimination and the Supreme Court—1971-1974*, 49 N.Y.U.L. REV. 617 (1974). For a discussion of the interventionism of the Burger Court and the possibility that the character of the statute and the resulting discrimination may emotively persuade the Court to strictly scrutinize and declare invalidity rather than the situation where if the statute is not outrageous the party attacking it would be given a stern lecture on state legislative autonomy, see Gunther, *supra* note 2; Note, 58 VA. L. REV., *supra* note 2.

Finally, the Supreme Court, by invalidating the Utah majority statute, has implied that a sex classification that unfairly discriminates against *either* sex will not be upheld. Such a rule is contrary to the holding in the recent case of *Kahn v. Shevin*.[55] In *Kahn* a Florida statute which permitted a tax deduction to widows but denied the same deduction to widowers was upheld on the theory that the statute was designed to eliminate past discrimination against women. Thus, in reverse discrimination cases the Court appeared hesitant to invalidate a statute which, on its face, was a denial of equal protection.[56]

Stanton also involves reverse discrimination. While the underlying purpose of a majority statute is the determination of the age at which the law will no longer protect minors, the prevailing understanding of the result of such a statute is that, at the prescribed age, the minor becomes an adult and receives the rights and privileges which go along with adult status. Thus, Sherri Stanton, at eighteen, was free to make her own contracts, marry without parental consent, sue in court in her own name, serve as administratrix of a decedent's estate or as executrix of a decedent's will, and enjoy all other rights granted and reserved to adults which under the statute could not be enjoyed by boys under twenty-one. Therefore, Sherri had the best of two possible worlds—not only was she legally an adult capable of making her own decisions, but also, under Utah law, was still entitled to parental support until she was twenty-one. The Court noted this effect[57] but nevertheless held the statute invalid despite the precedent of *Kahn*.[58] Hence, the reverse discrimination aspects, the statutory hurdles which could have prevented adjudication, and the tighter use of the *Reed* standard all point to a new and tougher Supreme Court stance on the issue of sex discrimination.

The foregoing analysis leads to the conclusion that the Supreme Court has taken a hesitant step toward a strict scrutiny standard of review in sex discrimination cases. The extension of the *Reed* standard and the cursory manner in which the Court struck down the majority statute are indicative of an evolutionary process of deciding sex discrimination cases. However, the current stance of the Court on this issue

55. 416 U.S. 351 (1974).

56. *See* DeFunis v. Odegaard, 416 U.S. 312 (1974) (per curiam); Note, *Constitutional Law—Tax Exemption for Widows Upheld over Sex Discrimination Challenge*, 53 N.C.L. REV. 551 (1975).

57. 95 S. Ct. at 1379.

58. An example of a case examining the reverse discrimination aspects involved in a majority statute is Jacobson v. Lenhart, 30 Ill. 2d 225, 195 N.E.2d 638 (1964).

remains extremely obscure in view of the conflicting precedent and the various standards that have been employed to test a statutory sex classification. This hit-or-miss approach is exasperating not only to lower courts which must apply some standard but also to the victimized litigants. If the Court intends to await the Equal Rights Amendment[59] and is simply stalling for time, as the *Frontiero* justices suggested, such action is questionable and certainly contrary to the principles of *Marbury v. Madison*[60] which uphold the belief that judicial thought will not be inhibited by tangentially related acts in the political arena. Indeed, the Court should declare sex classifications inherently suspect if only to clear up the confusion and variance which has resulted from its rulings.

Stanton is a step in this direction and should have a substantial effect on laws which make an age-sex differential.[61] It impliedly calls for an end to the "wholly chauvinistic" attitude that has possessed the Court for so many years. Indeed, the time appears ripe for the death of discrimination based on sex. This development would be welcome and would prevent us male chauvinists from speaking with pride the puritanical words of Justice Brewer who once said that ". . . history discloses the fact that woman has always been dependent upon man. He established his control at the outset . . . and this control . . . has continued to the present. . . . [L]ooking at [the situation] from the viewpoint of [woman's] effort to maintain an independent position in life, she is not upon an equality."[62]

JAMES M. ISEMAN, JR.

---

59. For a discussion of the Equal Rights Amendment *see* Brown, Emerson, Falk & Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871 (1971); Johnston, *supra* note 54.

60. 5 U.S. (1 Cranch) 137 (1803).

61. Other courts have dealt with similar *Stanton* age-sex differentials in statutes. *See* Lamb v. Brown, 456 F.2d 18 (10th Cir. 1972) (statute permitted juvenile court jurisdiction until age sixteen); Petty v. Petty, 252 Ark. 1032, 482 S.W.2d 119 (1972) (majority statute differential); Harrigfeld v. District Ct. of 7th Jud. Dist., 95 Idaho 540, 511 P.2d 822 (1973) (majority statute differential); Jacobson v. Lenhart, 30 Ill. 2d 225, 195 N.E.2d 638 (1964) (statute applied the two year statute of limitations to males after they reach twenty-one and to females after eighteen); Commonwealth v. Butler, 328 A.2d 851 (Pa. 1974) (criminal statute provided that women receive no minimum sentences while men have set minimums). In North Carolina there may be a question of *Stanton's* effect upon automobile liability insurance rates. Boys under twenty-five are placed in a higher risk category than girls of the same age.

62. Muller v. Oregon, 208 U.S. 412, 421-22 (1908).

Criminal Procedure—Protection of Defendants Against Prosecutorial Vindictiveness

The United States Supreme Court has repeatedly held that states may not place burdens on the assertion of a constitutional right that chill its exercise by criminal defendants.[1] In *Blackledge v. Perry*[2] the Court considered whether the power of the prosecutor to charge the defendant with a more serious crime at a trial *de novo* placed an unconstitutional burden on the right of appeal. The Court found that the situation presented an opportunity for prosecutorial "vindictiveness" and therefore held that the requirement of due process precluded a prosecutor from raising the charge.[3]

Jimmy Perry was charged with a misdemeanor and convicted in the North Carolina district court. He appealed to the superior court for a trial *de novo*.[4] After defendant's notice of appeal was filed, the prosecutor obtained a felony indictment against Perry based on the same conduct as the misdemeanor charge. At the trial *de novo* defendant pleaded guilty[5] to the felony charge and was sentenced to a prison term.

---

1. *See* text accompanying notes 12-27 *infra*.

2. 417 U.S. 21 (1974).

3. *Id.* at 28-29. Justice Stewart wrote the opinion for the majority, with Justices Rehnquist and Powell dissenting. Justice Rehnquist wrote a dissenting opinion with Justice Powell joining in Part II of that opinion. *Id.*

4. The trial *de novo* is a part of a two-tiered court system. An inferior court—the district court in North Carolina—has limited jurisdiction over misdemeanors and provides only non-jury trials. A defendant convicted in district court has an absolute right to a new trial in superior court regardless of plea, judgment or sentence. The superior court has general criminal jurisdiction and jury trial is provided. In superior court the slate is wiped clean, and new findings of law and fact are made without regard to error in the lower court proceedings. N.C. GEN. STAT. § 7A-290 (Supp. 1B, 1974); *see* Colten v. Kentucky, 407 U.S. 104, 113-14 (1972); State v. Spencer, 276 N.C. 535, 173 S.E.2d 765 (1970); State v. Sparrow, 276 N.C. 499, 173 S.E.2d 897 (1970); State v. Bryant, 11 N.C. App. 423, 181 S.E.2d 211 (1971).

5. The Court's analysis of the defendant's guilty plea to the felony charge raised a second issue which is in itself noteworthy. Prior decisions of the Supreme Court have limited the review of convictions based on guilty pleas to the question of whether the guilty plea was voluntary. Tollett v. Henderson, 411 U.S. 258 (1973); Parker v. North Carolina, 397 U.S. 790 (1970); McMann v. Richardson, 397 U.S. 759 (1970); Brady v. United States, 397 U.S. 742 (1970). Relief has been denied to defendants who pleaded guilty voluntarily even though there was a constitutional violation in the proceedings "antecedent" to the guilty plea. *Tollett v. Henderson, supra* at 265-66. In *Blackledge*, however, the Court granted the defendant relief without regard to the voluntariness of the plea because the due process violation went to the "power of the State to bring the defendant into court" on the felony charge. 417 U.S. at 30. The Court distinguished the prior cases on the ground that the constitutional defect in *Blackledge* could not be "cured." *Id.* at 30-31. The remedy for the due process violation was "to prevent a trial from taking place at all, rather than to prescribe procedural rules that govern the conduct

On a petition for a writ of habeas corpus, defendant alleged that the practice of increasing the charge at a trial *de novo* violated the due process clause of the fourteenth amendment.[6]

The issue before the Court was whether the practice of raising the charge against a defendant at a trial *de novo* presented the "hazard of vindictiveness."[7] The Court found that the prosecutor has a "considerable stake" in discouraging appeals since every appeal dissipates valuable prosecutorial resources.[8] The prosecutor can "up the ante" by raising the charge and thus be assured that few defendants will "brave the hazards of a *de novo* trial."[9] Because the defendant's apprehension of retaliation will deter him from exercising his statutory right of appeal, the Court concluded that the situation "pose[d] a realistic likelihood of 'vindictiveness' "[10] and held that raising the charge at a trial *de novo* violated the due process clause of the fourteenth amendment.[11]

The rationale of *Blackledge v. Perry* is derived from previous Supreme Court decisions that preclude states from "chilling" the exercise of constitutional rights.[12] The Court has carefully scrutinized actions by states that deter defendants from exercising their rights by penalizing those who assert them,[13] finding some of these burdens unconstitutional.[14] Three situations in which the states have placed burdens on the exercise of constitutional rights have been considered.

In the first situation, a burden is placed on the assertion of a single constitutional right. The Court has held that in this situation a state may compel defendants to choose between asserting or waiving a constitu-

---

of a trial." *Id.* at 31, *quoting* Robinson v. Neil, 409 U.S. 505, 509 (1973). Because Perry could not be tried at all for the felony charge, the Court departed from precedent and granted Perry relief without regard to his guilty plea.

A full discussion of the ramifications of this aspect of the decision is beyond the scope of this note. *Blackledge*, however, upsets the finality of some guilty plea convictions. The Court did not state what other constitutional rights are "power"-related but indicated that double jeopardy has similar characteristics. *See* 417 U.S. at 31.

6. 417 U.S. at 25. The defendant also argued that raising the charge at a trial *de novo* violated the double jeopardy provision of the Constitution, but the Court did not reach this issue.

7. *See id.* at 27; note 31 *infra.*

8. 417 U.S. at 27.

9. *Id.* at 27-28.

10. *Id.* at 27.

11. *Id.* at 28-29.

12. *See id.* at 25; North Carolina v. Pearce, 395 U.S. 711, 724 (1969); United States v. Jackson, 390 U.S. 570, 581 (1968).

13. *See generally* 417 U.S. at 25; North Carolina v. Pearce, 395 U.S. 711 (1969); United States v. Jackson, 390 U.S. 570 (1968).

14. Some have not been struck down. 417 U.S. at 27; Chaffin v. Stynchcombe, 412 U.S. 17, 30-32 (1973); Colten v. Kentucky, 407 U.S. 104, 116 (1972); Crampton v. Ohio, 402 U.S. 183, 212 (1971).

tional right so long as "compelling the election [does not impair] to an appreciable extent any of the policies behind the rights involved."[15] In *Griffin v. California*[16] the Court held that a prosecutor may not comment to the jury on the fact that the defendant did not testify at trial. The Court stated that the fifth amendment privilege against self-incrimination outlawed the "inquisitorial system of criminal justice" and that to allow the prosecutor to draw negative inferences from the defendant's exercise of the privilege would severely undercut its meaning.[17] In *Crampton v. Ohio*,[18] however, the Court found that the policies behind the fifth amendment privilege did not necessitate separate trials on the issues of guilt and punishment when the decision on each is left to the jury. The Court recognized that at a single trial the defendant may be deterred from exercising his fifth amendment privilege in order to testify on the issue of punishment. The defendant might, therefore, elect to testify, thus possibly damaging his case on the issue of guilt.[19] Nevertheless, since the policies behind the privilege do not preclude cross-examination and impeachment of a defendant who takes the stand, even though his case on guilt may thus be damaged, the Court found that the burden placed on the defendant's right in *Crampton* was not unconstitutional.[20]

In the second situation, a single burden inhibits the exercise of more than one constitutional right. In this situation the Supreme Court has looked solely to the effect of the burden on the exercise of the constitutional rights involved. In *Simmons v. United States*[21] the Court held that a burden that compels a defendant to choose between asserting one constitutional right or another is unconstitutional. Likewise, in *United States v. Jackson*[22] the Court declared unconstitutional a portion

15. Crampton v. Ohio, 402 U.S. 183, 213 (1971).
16. 380 U.S. 609 (1965).
17. *Id.* at 614-15.
18. 402 U.S. 183 (1971).
19. *Id.* at 214-15.
20. *Id.* at 216-17.
21. 390 U.S. 377 (1968). In *Simmons* the defendant testified at a hearing on a motion to suppress evidence from an allegedly illegal search and seizure. His testimony was admitted at trial against him on the issue of guilt. The Court reversed the conviction holding that a state may not require a defendant to surrender his fifth amendment privilege against self-incrimination in order to assert a fourth amendment right; to compel an election between rights is unconstitutional. *Id.* at 394.
22. 390 U.S. 570 (1968). In *Jackson* the defendant claimed he was compelled to plead guilty to a charge under the Federal Kidnapping Act, 18 U.S.C. § 1201(a) (1970), since the death penalty could be imposed only by the jury. The Court found that the punishment provision in the statute not only deterred the defendant from asserting his sixth amendment right to jury trial but also his fifth amendment privilege not to plead guilty. 390 U.S. at 581.

of a statute that inhibited the exercise of the defendant's sixth amendment right to jury trial and fifth amendment privilege against self-incrimination. Even though the Court found that there was a valid purpose behind the statute, its effect on the exercise of basic rights made the statute unconstitutional.[23]

The third situation the Court has considered is that in which a state places a burden on the right of appeal. The Constitution does not require the states to grant appeals from criminal convictions.[24] Once avenues of review are established, however, the due process clause of the fourteenth amendment protects the defendant's free exercise of his statutory right.[25] When the right of appeal is concerned, the Court has developed a unique standard for determining whether a burden is unconstitutional. Instead of looking solely to the effect the burden has on exercising the right to appeal, the Court examines the State's purpose for imposing the burden. If the State's purpose is to deter appeals, the actions are "vindictive" and the burden is unconstitutional.[26]

The "vindictiveness" standard was first articulated by the Court in *North Carolina v. Pearce*.[27] In *Pearce* the Supreme Court invalidated a higher sentence received by the defendant from the same court following a successful appeal and reconviction. Since there was a likelihood that the sentence was imposed in retaliation against the defendant for pursuing an appeal,[28] the Court found that the increased sentence operated as a penalty. The Court recognized that apprehension of such retaliation would deter other defendants from seeking appellate review and therefore held that due process limited judicial discretion in determining sentences.[29] The decision, however, was not based on the actual motives or apprehensions of the persons involved. The Court instead drew its conclusions from an analysis of the objective circumstances.[30]

The factors presenting what the Court has termed the "hazards of vindictiveness" were explored more fully in two subsequent cases.[31] In

23. 390 U.S. at 591.

24. Ross v. Moffitt, 417 U.S. 600, 606 (1974); McKane v. Durston, 153 U.S. 684, 687 (1894).

25. Blackledge v. Perry, 417 U.S. at 25 n.4; North Carolina v. Pearce, 395 U.S. 711, 724 (1969); *see also* Rinaldi v. Yeager, 384 U.S. 305, 309-10 (1966); Griffin v. Illinois, 351 U.S. 12, 18-19 (1956).

26. *See* 417 U.S. at 25-26; North Carolina v. Pearce, 395 U.S. 711, 725 (1969).

27. 395 U.S. 711 (1969).

28. *Id.* at 724-25.

29. *Id.* at 724.

30. Blackledge v. Perry, 417 U.S. at 28. The Court specifically stated that in *Blackledge* there was no evidence of actual maliciousness on the part of the prosecutor.

31. Chaffin v. Stynchcombe, 412 U.S. 17, 25 (1973).

Colten v. Kentucky[32] defendant was convicted in district court and appealed to the superior court for a trial *de novo*. Following his conviction in the superior court defendant received a longer sentence than he had received in the district court. The defendant in *Chaffin v. Stynchcombe*[33] was initially tried and sentenced by a jury and successfully appealed his conviction. He was retried by a different jury which imposed a longer sentence. In both of these cases the Supreme Court found that the increased sentence did not constitute an unconstitutional burden on appeal.[34] According to the Court, the key element of "vindictiveness," a motive for retaliation, was absent.

Colten turned on the fact that the court which imposed the second sentence was different from the court imposing the first sentence.[35] Unlike in *Pearce*, the judge at the trial *de novo* is not asked to do again what he thought he had done properly the first time.[36] In *Chaffin*, not only were the two juries different, but the Supreme Court found that, in general, juries do not have an institutional interest in discouraging appeals.[37] Although in both contexts a burden is placed on appeal since a longer sentence can result, the increase is permissible because it is not designed to deter appeals.[38]

The decision in *Blackledge v. Perry* is a logical extension of these cases. The Court focused for the first time on the actions of the prosecutor to determine if an unconstitutional burden was placed on appeal. In order to discern whether the purpose of raising the charge was to deter appeals, the Court examined the situation to see if it "pose[d] a realistic likelihood of 'vindictiveness'."[39] The elements of vindictiveness were satisfied: 1) a *penalty* or burden—the increased

32. 407 U.S. 104 (1972).
33. 412 U.S. 17 (1973).
34. *Id.* at 26; 407 U.S. at 116.
35. 407 U.S. at 116.
36. *Id.* The Court may be right in concluding that one type of retaliatory motive stems from the fact that the court imposing sentence has been corrected on appeal and this factor is absent at the trial *de novo*. The Court, however, failed to take into account the institutional interest in discouraging appeals that all courts have in common. The pressure of the backlog of criminal cases could easily provide a strong motivation for judges to discourage appeals. Even though a trial *de novo* is a new trial on the merits, it is certain that the judge knows that the case is an appeal filling up his docket. *See* Alpin, *Sentence Increases on Retrial After North Carolina v. Pearce*, 39 U. CIN. L. REV. 427, 432-33 (1970) [hereinafter cited as Alpin].
37. 412 U.S. at 27.
38. *Id.* at 29; 407 U.S. at 116. In both *Chaffin* and *Colten* the Court found that the jury and judge possess the power to determine punishment on the basis of a fresh evaluation of the evidence and demeanor of the defendant. Flexibility in this process was seen to serve a legitimate purpose. 412 U.S. at 32; 407 U.S. at 117.
39. 417 U.S. at 27.

charge—resulted from the defendant's exercise of his right of appeal;[40] 2) a *motive for retaliation* was present since the prosecutor has a desire to conserve state resources;[41] and 3) the *same state representative*, the prosecutor, was involved throughout the appellate procedure.[42]

The Court concluded that since fear of prosecutorial vindictiveness would deter defendants from exercising their right of appeal, the due process clause of the fourteenth amendment precluded the prosecutor from raising the charge at a trial *de novo*.[43] This absolute prohibition against increasing the charge is a more drastic remedy than the one fashioned by the Court in *North Carolina v. Pearce*.[44] In *Pearce* the Court permitted the judge to increase the sentence following an appeal if the increase was supported by objective evidence of the defendant's conduct ascertained subsequent to the first hearing.[45] This remedy was purportedly designed to eliminate the motivation for retaliation.[46] The remedy may more accurately be viewed as designed to dispell the defendant's fear of retaliation by removing the court's ability to penalize him.[47] The motivation to deter appeals may still be present, but the method of implementing it is eliminated. Realization by the defendant that a penalty cannot be imposed for appealing relieves the burden on appeal.

The remedies for *vindictiveness*, however, do not reflect solely the perspective of the defendant. Rather, the apprehensions of the defendant are balanced against policy considerations that favor retaining discretion by the party imposing the burden.[48] In *Pearce*, for example, the Court allowed the judge to retain some discretion in sentencing. Flexibility in the sentencing process is balanced against the deterrent effect an in-

40. *Id.* at 27-28.

41. *Id.* at 27. The necessity of the presence of this factor is seen by the Court's decisions in *Chaffin* and *Colten*, *see* text accompanying notes 32-38 *supra*.

42. 417 U.S. at 27.

43. *Id.* at 28-29.

44. 395 U.S. 711 (1969). Justice Rehnquist, in his dissent, argued that the remedy fashioned by the majority went beyond the identified wrong. 417 U.S. at 34. He felt the appropriate remedy would be to resentence the defendant in accordance with *Pearce* and let the felony conviction stand. 417 U.S. at 39. Although the sentence a defendant receives is the greatest deterrent to appeal, Justice Rehnquist did not take into account the collateral consequences flowing from a felony conviction such as loss of voting rights in some states. Resentencing the defendant would not remove these further penalties on the defendant. *See generally* Special Project, *The Collateral Consequences of a Criminal Conviction*, 23 VAND. L. REV. 929, 955-60 (1970); text accompanying notes 46-53 *infra*.

45. 395 U.S. at 726.

46. *Id.* at 725-26.

47. *See* 417 U.S. at 28.

48. *See* North Carolina v. Pearce, 395 U.S. at 724.

creased sentence has on appeal. By limiting the increase to those situations in which the defendant's conduct warrants increased punishment, the judge can "[fit the punishment to] the offender and not merely the crime"[49] while assuring the defendant that the increase will not be imposed vindictively.

The balance between the state's interest and the defendant's interest is resolved differently when the prosecutor is involved. The policies favoring judicial discretion and flexibility in sentencing are not applicable to prosecutorial discretion in determining charges. The defendant's apprehension of retaliation is greater in the *Blackledge* situation because the prosecutor is his adversary.[50] There is no way to make the power to raise the charge conditional on a showing of a permissible purpose and at the same time remove the penalty on the defendant that deters appeals. While there may be permissible reasons for raising the charge in some cases, such as the discovery of new evidence, the defendant's apprehension of retaliation would not be dispelled. The defendant in the *Pearce* situation maintains a degree of control over an increase in sentence by his conduct.[51] After the initial charge in the *Blackledge* situation, however, the prosecutor and not the defendant has control over increasing the charge.[52] The fact that the prosecutor could later justify his actions to a court and show that there was no actual vindic-

49. Williams v. New York, 337 U.S. 241, 247 (1949).

50. Justice Rehnquist noted that the prosecutor is a "natural adversary" of the defendant but did not think that this fact would contribute to the possibility of vindictiveness. It is rather peculiar that a judge, as in *Pearce*, who is presumably impartial to the issue of defendant's guilt would necessitate greater scrutiny than a prosecutor whose job is to obtain convictions. 417 U.S. at 32-34; *see* Alpin, *supra* note 36, at 452.

51. It is uncertain exactly what type of objective evidence is permissible to support an increase in sentence. The Court stated that it must be "objective information concerning identifiable conduct on the part of the defendant *occurring* after the time of the original sentencing proceeding." 395 U.S. at 726 (emphasis added). Although this language strongly indicates that evidence of prior conduct of the defendant coming to the judge's attention for the first time at the second sentencing hearing would be excluded, the Supreme Court will have to clarify this point. *See* Alpin, *supra* note 36, at 444-45.

52. The factors which would cause a prosecutor to raise the charge bear no relationship to anything the defendant does, but depend upon external events. The discovery of new evidence, for instance, supporting a higher charge depends upon the thoroughness of the prosecutor's investigation. Justice Rehnquist notes that a prosecutor may seek a lower court determination because it is expeditious even though he has the evidence to obtain a conviction on a higher charge. 417 U.S. at 34. In each case, the opportunity for raising the charge is not tied to any action by the defendant other than appeal. Because the prosecutor has a great deal to gain from deterring appeals the defendant will always view the actions as vindictive. Whereas in *Pearce* the defendant could control the length of sentence by ordering his conduct accordingly, in *Blackledge* the only way the defendant can be assured the charge will not be raised is to refrain from appealing.

tiveness does not remove the defendant's fear of retaliation. The defendant will still view the power to raise the charge as an opportunity for retaliation and will thus be deterred from appealing.

Although society has an interest in convicting the defendant for the highest offense his conduct warrants, the prosecutor serves this interest by bringing the initial charge. Once the charge has been brought, the defendant's interest in a fair trial must be served. If a defendant is deterred from appealing he has lost his only opportunity for a review of the fairness of his conviction. The power of the prosecutor to raise the charge on appeal has too grave an effect on the rights of the defendant to give the prosecutor a second chance to promote society's interest.

The rationale of *Blackledge* may be applied to curtail the power of the prosecutor to raise the charge following appeal in three contexts outside the trial *de novo*:[53] 1) when the prosecutor reindicts the defendant for a higher charge based on the same conduct following normal channels of appeal;[54] 2) when the prosecutor reindicts the defendant under a recidivist statute calling for increased punishment on conviction;[55] and 3) when the defendant is tried on the original indictment after successfully challenging a guilty plea conviction on a lesser included offense.[56]

The first two situations present the same elements of vindictiveness found in *Blackledge*. The same retaliatory motive recognized in *Blackledge* is present in both. Reindicting the defendant on a higher charge or under a recidivist statute operates as a penalty for pursuing an appeal and the state's representative, the prosecutor, is involved throughout the proceedings. Since the defendant's apprehension of prosecutorial vindictiveness would deter him from appealing, the remedy fashioned in *Blackledge* may be appropriately extended to limit the charge on retrial of the defendant to that originally brought.[57]

---

53. Twenty-five states have a trial *de novo* system that will be affected by the decision in *Blackledge*: Arizona, Arkansas, Colorado, Florida, Indiana, Kansas, Kentucky, Maine, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Pennsylvania, Texas, Virginia, Washington, West Virginia. Colten v. Kentucky, 407 U.S. 104, 112 n.4 (1972).

54. Alpin, *supra* note 36, at 451; *see, e.g.*, Sefcheck v. Brewer, 301 F. Supp. 793 (S.D. Iowa 1969).

55. Alpin, *supra* note 36, at 451; *see, e.g.*, Kansas v. Young, 200 Kan. 20, 434 P.2d 820 (1968).

56. *See* Ward v. Page, 424 F.2d 491 (10th Cir. 1970); Note, *The Constitutionality of Reindicting Successful Plea-Bargain Appellants on the Original Higher Charge*, 62 CALIF. L. REV. 258 (1974); *cf.* Mullreed v. Kropp, 425 F.2d 1095 (6th Cir. 1970).

57. In Ewell v. United States, 383 U.S. 116 (1965), the Supreme Court earlier rejected a double jeopardy challenge to the retrying of a defendant on additional charges

The situation in which a defendant is retried on the original charge after successfully challenging a guilty plea to a lesser included offense presents a different question. A plea bargain consists of a guilty plea by the defendant in return for a moderate sentence or a conviction on a lesser included offense. An appeal from a plea bargain is generally limited to a consideration of the voluntariness of the guilty plea.[58]

Although the likelihood of retrial on the original charge contained in the indictment may deter a defendant from exercising his right of appeal, it is doubtful that the state has placed any burden on the right of appeal at all. In a sense, the plea bargain falls outside the normal channels of the criminal process. The defendant who participates in a plea bargain has been relieved of trial on the greater charge by pleading guilty to a lesser offense. A successful appeal places him in the same position that he was in prior to the guilty plea. The charge on retrial is the same charge that initiated the proceedings against the defendant; the prosecutor has not "upped the ante." The defendant is deterred from appeal not because the state has imposed a burden, but because the defendant has received a benefit that he does not want to relinquish.[59]

By holding that prosecutorial vindictiveness can place an unconstitutional burden on the right of appeal, the Supreme Court has liberated the concept of vindictiveness from the sentencing context. The reasoning in *Blackledge v. Perry* indicates that the holding may extend beyond the limited situation of the trial *de novo* to curtail the power of the prosecutor to raise the charge following normal channels of appeal. *Blackledge*

---

arising from the same conduct that formed the basis for the original indictment. The precedential effect of the *Ewell* decision, however, is questionable. *Ewell* arose prior to the Court's articulation of the "vindictiveness" standard in *North Carolina v. Pearce*. In addition, *Ewell* was decided on double jeopardy grounds. The Court made a distinction in *Pearce* between the two claims. Even in *Pearce*, the Court rejected the defendant's argument that the increase in sentence violated the double jeopardy clause. 395 U.S. at 719-21. The Court, however, went on to rule in favor of the defendant on due process grounds. *Id.* at 725-26. If a case similar to *Ewell* were presented to the Court today, the Court could easily find a due process violation without overruling *Ewell*.

58. *See* note 5 *supra*.

59. *But see* Note, 62 CALIF. L. REV., *supra* note 56. Plea bargaining presents special problems in criminal procedure that the Court has not squarely faced. Retrial on the original charge is a deterrent to appeal even though it does not fit into the vindictiveness analysis. Although the defendant may be retried on the original charge because of the actual desire of the prosecutor to secure the finality of convictions, society has a greater interest in securing a conviction on the highest charge the evidence supports. Unlike in *Blackledge*, society's interest was never fully served because of the plea bargain. The defendant's interest is not protected since he may be deterred from appeal. The only true benefit of plea bargaining is the fast and final disposition of cases. Because plea bargaining is so widespread, it should be thoroughly examined by the Supreme Court and constitutional standards should be determined.

and other cases applying the vindictiveness standard indicate that some burdens may be placed on the defendant's right of appeal, but that acts of the state designed to deter appeals are unconstitutional.

AVIS E. BLACK

The Statute of Frauds—Application of the Main Purpose Rule: Eliminating a Short Cut Through the "Corporate Veil"

The statute of frauds makes unenforceable the promise of one person to assume the debt or to guarantee the credit of another unless the promise or guarantee is supported by a writing signed by the promisor.[1] The chief limitation on this application of the statute is the so-called "main purpose" or "leading object" rule, which defeats the operation of the statute when the promisor has a personal pecuniary interest in the transaction concerned.[2] In *Burlington Industries v. Foil*[3] the North Carolina Supreme Court attempted to clarify what had become a haphazard application of the main purpose rule to oral representations made by corporate officers, directors, or shareholders concerning corporate debt. The opinion adhered to the classical standard for application of the main purpose rule, rejecting any per se application of the rule in the context of the close corporation.

The two individual defendants in *Burlington*, Martin B. Foil, Jr., and William H. Taylor, both were officers, directors, and shareholders in the bankrupt, Colonial Fabrics, Inc., a North Carolina corporation.[4] Colonial, a close corporation,[5] was organized in 1970 and achieved a

---

1. This provision has remained essentially unchanged since the passage of the original statute of frauds in 1676. The act was originally titled "An Act for the Prevention of Frauds and Perjuries." 29 CAR. II, c. 3 (1676).

2. A clear statement of the main purpose rule is found in Emerson v. Slater, 63 U.S. (22 How.) 28, 43 (1859):

> [W]henever the main purpose and object of the promisor is not to answer for another, but to subserve some pecuniary or business purpose of his own, involving either a benefit to himself, or damage to the other contracting party, his promise is not within the statute, although it may be in form a promise to pay the debt of another, and although the performance of it may incidentally have the effect of extinguishing that liability.

This portion of the *Emerson* opinion is quoted verbatim by the North Carolina Supreme Court in Burlington Indus. v. Foil, 284 N.C. 740, 748, 202 S.E.2d 591, 597 (1974).

3. 284 N.C. 740, 202 S.E.2d 591 (1974).

4. *Id.* at 741, 202 S.E.2d at 593.

5. Colonial's president, E. B. Fowler, owned one-half of the stock. Defendants

substantial degree of early success. During this early profitable period a salesman for Burlington Industries contacted Colonial president E. B. Fowler III, and they reached an agreement, subject to approval by Burlington's credit department, for the sale of yarn to Colonial. Burlington's credit manager, J. H. Barnes, ran into difficulties in obtaining financial information about Colonial. Although Fowler suggested that Burlington could obtain Foil's personal guarantee[6] if credit could not be extended on the information available, Barnes approved the agreement, and shipment began without any prior guarantee.[7]

As the result of market shifts, Colonial began to experience financial troubles. This prompted Barnes to contact Foil for the first time, allegedly receiving assurance that Foil and Tuscarora Cotton Mill, also a North Carolina corporation in which the individual defendants were officers, directors, and shareholders, would stand behind Colonial's credit. Burlington sought the execution of a written agreement guaranteeing Colonial's credit; however, Foil and Tuscarora refused. Shipments were halted for a time but then resumed, reportedly on the strength of further oral representations by Foil.[8]

The situation deteriorated and, although Colonial made some payments, its account with Burlington fell behind. During this time Barnes met with defendant Taylor, who allegedly gave his own personal guarantee of Colonial's credit and at one point issued his personal check in the amount of 25,000 dollars in lieu of a bad check Burlington had received from Colonial.[9] Colonial went into involuntary bankruptcy in October 1971 and was at that time in arrears to plaintiff in excess of 55,000 dollars. Plaintiff instituted this action on the alleged oral promise

---

Foil and Taylor were treasurer and secretary respectively and each owned one-sixth of the stock with the remaining one-sixth interest being held by Foil's mother. *Id.* at 741, 743, 202 S.E.2d at 593-94. For various definitions of "close corporations" see 1 F. O'NEAL, CLOSE CORPORATIONS §§ 1.02, 1.07 (1971).

6. The facts indicate that Burlington's credit manager, Barnes, knew the defendant Foil personally and was confident of his financial position. 284 N.C. at 744-46, 202 S.E.2d 594-95.

7. It should be noted that all of the alleged personal guarantees received by the plaintiff were received after the agreement had been approved and credit extended. This is a strong indication that the credit was extended to the corporation rather than to the individual defendants, and that the promises when made were collateral (within the statute) rather than original (without the statute). Indeed this fact proves to be determinative as to the court's holding the promises to be collateral. *Id.* at 754-55, 202 S.E.2d at 601. For discussion and cases on original and collateral promises in the corporate context, see Annot., 35 A.L.R.2d 906 (1954).

8. 284 N.C. at 745, 202 S.E.2d at 595.

9. Upon issuance of this personal check, Taylor obtained a written agreement from Fowler acknowledging a loan in that amount from Taylor to Colonial at six and one-half percent interest. *Id.* at 757, 202 S.E.2d at 602.

of the defendants. Defendants denied the guarantee and affirmatively pleaded the statute of frauds as a defense. The trial court directed a verdict for the defendants and the North Carolina Court of Appeals affirmed.[10] The supreme court, in turn affirming, adhered to the general principle that for the main purpose rule to apply in this context, the corporate officers, directors, or shareholders must receive some direct *personal* benefit from the transaction over and above the indirect benefit they receive by virtue of their corporate positions.[11]

The statute of frauds provision relied on by the defendants in *Burlington* is virtually identical to section 4 of the original statute of frauds set forth in the statutes of Charles II.[12] As with other applications of the statute of frauds, this particular provision of section 4 has raised questions as to whether it creates more frauds than it prevents. Early English case law made it clear that, notwithstanding the protection of section 4, a person deceitfully making oral misrepresentations about the credit of another would not be protected.[13]

Further restriction of the sometimes harsh application of the statute in this area still seemed necessary. It came by way of a judicial gloss first articulated by the Supreme Court of Massachusetts in *Nelson v. Boynton*.[14] The opinion stated what has come to be known as the

---

10. 19 N.C. App. 172, 198 S.E.2d 194 (1973).
11. 284 N.C. at 749-50, 202 S.E.2d at 598.
12. N.C. GEN. STAT. § 22-1 (1965) provides:

> **Contracts charging representative personally; promise to answer for debt of another.**—No action shall be brought whereby to charge an executor, administrator or collector upon a special promise to answer damages out of his own estate or to charge any defendant upon a special promise to answer the debt, default or miscarriage of another person, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party charged therewith or some other person thereunto by him lawfully authorized.

29 CAR. II, c. 3 § 4 (1676) provides:

> [N]o action shall be brought whereby to charge any executor or administrator upon any special promise, to answer damages out of his own estate; (2) or whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriages of another person; . . . (6) unless the agreement upon which such action shall be brought, or some *memorandum* or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized.

The 1828 passage of Lord Tenterden's Act, 9 GEO. IV, c. 14, § 6 (1828), a notable British modification of § 4 of the statute of frauds enacted for the purpose of strengthening and broadening its application, has had no effect on North Carolina law, though it has been adopted in varying degrees by other states. For an illuminating review of the application of this modification in one state that adopted it, see Taylor, *The Statute of Frauds and Misrepresentations as to the Credit of Third Persons: Should California Repeal Its Lord Tenterden's Act?*, 16 U.C.L.A.L. REV. 603 (1969).

13. Pasley v. Freeman, 3 T.R. 51, 100 Eng. Rep. 450 (K.B. 1789).
14. 44 Mass. (3 Met.) 396, 37 Am. Dec. 148 (1841).

leading object or main purpose rule.[15] This approach avoids the statute of frauds when the promisor, though incidentally guaranteeing or assuming the debt of another, acts to gain a personal benefit. Citing *Nelson*, the United States Supreme Court applied the main purpose rule in *Emerson v. Slater*.[16] *Emerson* has become the primary authority for application of the rule in the United States,[17] and has been cited extensively by the North Carolina Supreme Court since its first application of the rule in 1910.[18]

Despite the widespread acceptance of the main purpose rule, courts have been unwilling to apply it when the interest of the officer, director, or shareholder involved is no more than a general one in the success of the corporate venture.[19] In order for the rule to apply, the person involved must have some "pecuniary or business purpose of his own"[20] in the transaction, which is additional to and separate from that of the corporate entity.[21] This distinction is conceptually difficult to draw when dealing with a close corporation. Consequently, courts considering the applicability of the rule in this context have expressed contradictory opinions, both in North Carolina[22] and elsewhere.[23]

In *Burlington* the court stated that the controlling issue was whether the main purpose rule was applicable.[24] While ultimately refusing to apply the rule, the decision clearly asserted the continuing validity of the doctrine in North Carolina law.[25] In doing so, however, the court rejected a per se application of the main purpose rule to close corporations, distinguishing two of its decisions, *Warren v. White*[26] and *May v. Haynes*,[27] on which the plaintiff relied. The importance of *Burlington*

15. *Id.* at 402, 37 Am. Dec. at 151.
16. 63 U.S. (22 How.) 28, 41 (1859).
17. For other cases upholding the rule see Annot., 35 A.L.R.2d 906 (1954).
18. Dale v. Gaither Lumber Co., 152 N.C. 621, 68 S.E. 134 (1910).
19. Annot., 35 A.L.R.2d 906 (1954).
20. Emerson v. Slater 63 U.S. (22 How.) 28, 43 (1859).
21. *Id.*
22. Note, *Statute of Frauds—The Main Purpose Doctrine in North Carolina*, 13 N.C.L. REV. 263 (1935).
23. For comment on similar problems resulting from decisions in West Virginia see Morris, *The Leading Purpose Doctrine as Applied to the Statute of Frauds*, 62 W. VA. L. REV. 339, 341-47 (1960). For comment as to the problem generally see Simpson, *A Suggested Test for Application of the Main Purpose Rule Under the Statute of Frauds*, 36 CALIF. L. REV. 405, 411 (1948).
24. 284 N.C. at 749, 202 S.E.2d at 598.
25. *Id.* at 748, 202 S.E.2d at 597.
26. 251 N.C. 729, 112 S.E.2d 522 (1960). The defendant, sole shareholder of an automobile dealership, hired a general manager, authorizing him to make certain expenditures and promising to reimburse him personally if corporate income proved inadequate.
27. 252 N.C. 583, 114 S.E.2d 271 (1960). The defendant, dominant shareholder in

lies as much with its handling of these two earlier cases as with its substantive resolution of the factual arguments presented.[28]

The facts presented in *Warren* and *May* differ significantly from those presented in *Burlington* in two aspects. First, in distinguishing the two earlier cases, the *Burlington* court pointed to the virtual sole ownership positions of the defendants in those cases.[29] Although the court in *Burlington* refrained from stating that the dominant shareholder position of the promisors in the earlier cases was the essential distinction, there was heavy reliance on this fact in applying the main purpose rule in *Warren*[30] and *May*.[31] And the *Burlington* decision, rejecting the application of the main purpose rule, did point out the minority shareholder position of both individual defendants.[32] Reliance on the extent of ownership as the crucial factor leads to a per se application of the main purpose rule to oral promises by sole or dominant shareholders. This simple "rule of thumb" approach has been variously asserted and abandoned by courts in other jurisdictions.[33] This approach necessarily reduces the limited liability protection afforded by the corporate form to a sole or dominant shareholder, and in so doing, appears to contradict state statutory law,[34] which expresses a policy that close corporations, even with fewer than three shareholders, will be treated the same as other corporations under the law. If the earlier cases are distinguishable from *Burlington* on this ground, then sole or dominant shareholders should be counseled to pay particular attention to oral comments concerning corporate obligations.

The second potentially important distinction from the earlier cases, although not explicitly cited by the court in *Burlington*, is the indication

---

a development corporation, contracted for painting in a subdivision, telling the painter that the corporate assets and his personal assets were the same and that he would guarantee payment on the contract.

28. It is interesting to note that Justice Bobbitt authored both of the earlier opinions cited and also joined in the court's opinion in *Burlington*, now as Chief Justice.

29. 284 N.C. at 748, 202 S.E.2d at 597.

30. 251 N.C. at 734-35, 112 S.E.2d at 526.

31. 252 N.C. at 585, 114 S.E.2d at 273.

32. 284 N.C. at 749, 756, 202 S.E.2d at 597, 602.

33. Morris, *supra* note 23.

34. N.C. GEN. STAT. § 55-3.1 (1965) provides:

> **Effect of acquisition of all shares by less than three persons.**—(a) No provision in this chapter, or in any prior act shall be construed as an indication of any legislative intention that the existence of a corporation, hereafter or heretofore formed, is in any respect impaired by the acquisition of all of the shares by one person or by two persons or that by such acquisition the corporation ceases to possess any managerial boards or bodies or any capacities, powers, or authority which it would have possessed with three or more shareholders, or that upon such acquisition the corporation becomes dormant, inactive or incapable of acting as a corporation.

of significant comingling of personal and corporate assets in *Warren*[35] and *May*,[36] the very pitfall so carefully avoided by the defendants in *Burlington*.[37] Such comingling of assets has been cited as a primary justification for "piercing the corporate veil" and reaching the individual liability of shareholders.[38] The rationale for imposing personal liability is that if the shareholders are not treating the corporation as a separate entity, there is no justification for requiring others to do so. Although such actions are not uncommon in the context of the close corporation,[39] they are clearly more difficult to maintain than is the simple contract action relying on the main purpose rule, utilized in *Warren* and *May*.[40]

If either of these two distinctions, or both taken together, determine the application of the main purpose rule, then the complaining creditor may be presented with a handy short cut through the "corporate veil." Rather than attacking what may be an abuse of the corporate entity[41] to secure the shareholder's personal liability, an unscrupulous creditor may choose to assert falsely the oral personal guarantee of the shareholder. This possibility is precisely the abuse that section 4 of the statute of frauds was designed to prevent.[42]

However, an alternative resolution may exist, given the court's reliance on *Emerson v. Slater*[43] and its special emphasis on the adoption of the traditional application of the main purpose rule by other authorities.[44] Adhering to a strong classical test, the court seemed to overrule the per se approach of *Warren* and *May*. Certainly the court did not expressly overrule the earlier cases; in fact, the decision clearly purported to distinguish them.[45] However, in light of the statutory material cited above[46] and the alternative method available for reaching the same result in the earlier cases,[47] this interpretation may be viable.

---

35. 251 N.C. at 735, 112 S.E.2d at 526.
36. 252 N.C. at 585, 114 S.E.2d at 273.
37. This is evidenced by defendant Taylor's obtaining of the corporation's promissory note to cover his personal check given to plaintiff in lieu of Colonial's bad check. *See* note 8 *supra*.
38. 1 F. O'NEAL, *supra* note 5, § 1.10.
39. *Id.* § 1.09a.
40. While the latter action requires little more than an allegation of promise and appropriate testimony, the former will often rest on records and documents in the control of the defendant and requiring considerable discovery procedures to reach.
41. For various bases for attack on corporate entity see 1 F. O'NEAL, *supra* note 5.
42. Morris, *supra* note 23, at 340-41.
43. 284 N.C. at 748, 202 S.E.2d at 597.
44. *Id.* at 749-50, 202 S.E.2d at 598.
45. *Id.* at 750-51, 202 S.E.2d at 598-99.
46. *See* note 32 *supra*.
47. *See* text accompanying note 39 *supra*.

This does not mean that the main purpose rule cannot be invoked in cases involving close corporations, but only that in order to do so, the traditional "personal interests" test must be met.[48]

Although it is tempting to equate personal and corporate interests in dealing with a close corporation, especially when all or most of the shares are held by one person, this should not be done. If these interests are equated, then the application of the main purpose rule to avoid the strictures of the statute of frauds may become virtually automatic. Since such an assumption of equality of interests would always provide the necessary personal pecuniary or business interests required, the shareholders, officers, or directors in the close corporation might be found to have assumed personal responsibility for corporate debts because of careless, unwitting, unintentional, or casual remarks. Neither this result nor the potential abuse of a per se rule by desperate creditors[49] is desirable, for both seriously reduce the limited liability protection of the corporate form for a closely held enterprise.

Interpreting *Burlington* to overrule *Warren* and *May* in its application of the main purpose rule would leave the creditor with three distinct methods for reaching a shareholder's personal assets. The first, which is frequently employed by potential creditors of close corporations, is to require the written personal guarantee of shareholders before advancing credit.[50] The second is the already discussed course of attacking the corporate entity. The third would be an assertion of the main purpose rule where, in addition to the alleged oral promise, there is the requisite "direct and personal" interest cited as necessary by the court in *Burlington*.[51] It is not unreasonable to require a creditor desiring a personal guarantee in addition to corporate liability to get the guarantee in writing; nor is it unreasonable to require the creditor who does not take such action to carry the burden of proving abuse of the corporate entity in order to reach personal assets upon dissolution. When the corporate debtor becomes insolvent, the position of the disappointed creditor, who fails to properly secure personal liability in advance or to gain it through necessary litigation after the fact, is exactly that of the plaintiff in

48. A good example of the requisite personal interest in a modern context might occur where a shareholder in a land development corporation also privately owned property adjacent to that of the corporation. While his oral guarantee of the corporation's debt would benefit him as a shareholder, it would also benefit him personally to the extent that the success of the corporation's development efforts would enhance the value of his adjacent property.

49. *See* text accompanying note 42 *supra.*

50. 1 F. O'NEAL, *supra* note 5, § 2.03.

51. 284 N.C. at 750, 202 S.E.2d at 598.

Burlington: at the head of the line for distribution of the remaining unencumbered assets, but beyond that, subject to the losses which must sometimes result from the risk of credit extension. The main purpose rule should offer no more, and indeed as properly applied in *Burlington* it does not.

JOHN GARRETT PARKER